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84-385

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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September 11, 1984

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APPENDIX A

SUPREME COURT OF NEW JERSEY

September Term 1982

A-87

WALTER P. COONS,
Plaintiff-Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC., a corporation, *et al.*,
Defendants,

and

HONDA MOTOR COMPANY, LTD. OF JAPAN, a corporation,
Defendant-Respondent,

and

ATTORNEY GENERAL OF NEW JERSEY,
Intervenor-Respondent.

Argued January 24, 1984 Decided June 13, 1984

On a rehearing of a portion of the judgment of this Court, dated August 3, 1983 and reported at 94 *N.J.* 307 (1983). See 95 *N.J.* 234 (1984).

Robert H. Jaffe argued the cause for petitioner (*Jaffe & Schlesinger*, attorneys; *Mr. Jaffe* and *Howard G. Schlesinger*, on the brief).

Harry Haushalter, Deputy Attorney General, argued the cause for intervenor-respondent (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *James J. Ciancia*, Assistant Attorney General, of counsel).

John I. Lisowski argued the cause for respondent Honda Motor Company, Ltd. of Japan, etc. (*Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski*, attorneys; *Mr. Lisowski* and *Paul A. Lisovicz*, on the brief).

Karl Asch argued the cause for *amicus curiae pro se* (*Mr. Asch*, attorney; *Mr. Asch* and *Philip A. Tortoreti*, on the briefs).

I. Michael Greenberger, a member of the District of Columbia bar, argued the cause for *amicus curiae* Brinco Mining Limited (*Robinson, Wayne, Levin, Riccio & La Sala*, attorneys; *Mr. Greenberger, Susan S. Collins* and *Elizabeth Runyan Geise*, members of the District of Columbia bar, of counsel).

Raymond M. Tierney, Jr., argued the cause for *amicus curiae* G.D. Searle & Co. (*Shanley & Fisher*, attorneys; *Mr. Tierney* and *Susan M. Sharko*, on the brief).

Walter R. Cohn submitted a brief on behalf of *amicus curiae* Walter Cohn and Susan Cohn (*Walter R. Cohn*, attorney; *Thomas E. Cohn*, on the brief).

George J. Botcheos submitted a brief on behalf of *amicus curiae* Kelsey-Hayes Company (*Laskin & Botcheos*, attorneys; *Lowell A. Reed, Jr.*, and *Patricia A. Mattern*, members of the Pennsylvania bar, of counsel).

William H. Sheil submitted a brief on behalf of *amicus curiae* Association of Trial Lawyers of America, New Jersey affiliate (*Kronisch & Schkeeper*, attorneys).

J. Llewellyn Mathews submitted a brief on behalf of *amicus curiae* Roy Allen Hopkins (*Apell and Mathews*, attorneys).

The opinion of the Court was delivered by CLIFFORD, J.

In *Coons v. American Honda Motor Co.*, 94 *N.J.* 307 (1983) (*Coons I*), this Court addressed the constitutionality of *N.J.S.A.* 2A:14-22 in the face of an attack under the commerce clause, U.S. Const. art. 1, § 8, cl. 3. That statute tolls the running of the statute of limitations in actions against foreign corporations not represented in this state. We ruled that in order to achieve representation under the tolling statute, a corporation not organized in New Jersey and not represented in this state by any person upon whom process may be served must obtain a certificate to do business in New Jersey, pursuant to *N.J.S.A.* 14A:13-4, and thereby submit to the jurisdiction of the forum. 94 *N.J.* at 309. We further held that to require an unrepresented foreign corporation to satisfy that provision before it could gain the benefit of the statute of limitations imposed on such a corporation so impermissible a burden as to amount to a violation of the commerce clause. *Id.* Finally, we stated that our decision was to be given retrospective effect, "consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment." 94 *N.J.* at 319 (citing *Fox v. Snow*, 6 *N.J.* 12, 14 (1950)).

Following our decision in *Coons I*, plaintiff filed a petition for rehearing on all the issues that had been determined in that appeal. We directed defendant to respond solely on the question of retroactivity, and invited other counsel to address the same issue. The positions staked out in the supplemental briefs found plaintiff, supported by *amici curiae* Walter and Susan Cohn, Roy Hopkins, Karl Asch, P.A., and ATLA-NJ (The Association of Trial Lawyers of America, New Jersey Affiliate), arguing that our ruling should be prospective in application, a position shared by the Attorney General as intervenor-respondent. Defendant, who contends that *Coons I* should be applied retroactively, is joined by

amici curiae G.D. Searle & Co., Kelsey-Hayes Company, and Brinco Mining Limited.[1]

We granted the petition for rehearing, —— *N.J.* —— (January 3, 1984), limited to the retroactivity issue. We now hold as a matter of state law that *Coons I* is to be applied prospectively only, from the date of that decision, August 3, 1983.

I

In order that the issue may be set forth in the proper context, we advert to the significant facts and procedural history, borrowing at the outset from our recitation in *Coons I, supra*, 94 *N.J.* at 309.

> Plaintiff commenced this suit in 1978 against defendant Honda Motor Co., Ltd. (Honda) and its wholly-owned American distributor, American Honda Motor Co., Inc. (American Honda). The action seeks damages for personal injuries and consequential losses occasioned by an accident on October 30, 1974, when plaintiff was thrown from a motorcycle manufactured by Honda and distributed by American Honda. At all relevant times American Honda was a California corporation that maintained facilities in New Jersey. In contrast, Honda is a Japanese corporation that has never been authorized to do business in this or any other state and carries on no activities here or elsewhere in the United States.
>
> Because plaintiff had started suit four years after the accident, both Honda and American Honda raised as a defense the two-year statute of limitations for personal injury actions, *N.J.S.A.* 2A:14-2, and moved for summary judgment. The trial court

---

[1] The various *amici* are interested in the outcome of this appeal as it affects other litigation, including many asbestos exposure cases, to which they are party or in which they represent parties. *Amicus* ATLA-NJ expresses a concern "for the numerous people who are or will * * * become directly affected by the ultimate decision in this case * * *."

granted American Honda's motion but denied that of Honda, ruling that the two-year statute of limitations had been tolled by *N.J.S.A.* 2A:14-22 because Honda was a foreign corporation that was not "represented" in New Jersey by a person upon whom process could be served. In addition, the trial court held that there were sufficient bases for the exercise of *in personam* jurisdiction against Honda and that the tolling statute did not violate the equal protection clause of the federal Constitution.

The Appellate Division affirmed the judgment of the trial court. *Coons v. Honda Motor Co., Ltd., of Japan*, 176 *N.J.Super.* 575 (1980). After this Court denied cross-motions for leave to appeal, the parties sought review by the Supreme Court, which consented to hear only Honda's appeal. That Court vacated the judgment below and remanded to the Appellate Division. *Honda Motor Co., Ltd. v. Coons*, 455 *U.S.* 996, 102 *S.Ct.* 1625, 71 *L.Ed.*2d 857 (1982). Thereafter we certified the cause on our own motion. *R.* 2:12-1.

[*Id.* at 309-11 (footnote omitted).]

The Supreme Court's remand was designed to afford the state court the opportunity to reconsider its earlier determination in light of *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404, 71 *L.Ed.*2d 250 (1982). In *Searle*, Susan and Walter Cohn sought damages allegedly caused by Enovid, an oral contraceptive manufactured by Searle, a Delaware corporation not authorized to do business in New Jersey, with its principal place of business in Illinois. Upon plaintiffs' filing suit, more than ten years after the injury, in the Superior Court of New Jersey, later removed to the District Court, Searle set up as a defense the two-year statute of limitations. Judge Meanor found that the tolling provision relied on by the Cohns violated the equal protection clause. *Cohn v. G.D. Searle & Co.*, 447 *F.Supp.* 903, 912 (1978).

Issues substantially identical to those raised in *Searle* surfaced some months later in *Hopkins v. Kelsey-Hayes, Inc.*, 463 *F.Supp.* 539 (D.N.J. 1978). In that case District Court Judge Brotman expressly rejected the reasoning of Judge Meanor in *Searle* and found that *N.J.S.A.* 2A:14-22 withstood constitutional scrutiny under the equal protection clause. *Id.* at 542.

Prior to a decision in the consolidated appeal of *Hopkins* and *Searle* in the United States Court of Appeals for the Third Circuit, *Hopkins v. Kelsey-Hayes, Inc.*, 628 *F.*2d 801 (1980), this Court decided *Velmohos v. Maren Eng'g Corp.*, 83 *N.J.* 282 (1980), in which we upheld the tolling provision in the face of equal protection and due process challenges. The Third Circuit then adopted the *Velmohos* rationale and rejected defendants' constitutional attacks, 628 *F.*2d at 811-12.

Both Searle and Kelsey-Hayes sought certiorari in the United States Supreme Court, which granted the petition of Searle, filed one day earlier than that of Kelsey-Hayes. The Court held that *N.J.S.A.* 2A:14-22 withstood constitutional scrutiny arising under equal protection and due process of law. Justice Blackmun, writing for the majority, did not, however, decide the issue raised by Searle's commerce clause argument. Because that issue was "clouded by an ambiguity in state law", 455 *U.S.* at 413, 71 *L.Ed.*2d at 259, the Court instead remanded the case to the Third Circuit, along with *Kelsey-Hayes* after vacating the judgment in that case. 455 *U.S.* ——, 71 *L.Ed.*2d 844 (1981) (mem.). In a single decision the Third Circuit remanded both *Searle* and *Kelsey-Hayes* to the District Court for resolution of the commerce clause question. *Hopkins v. Kelsey-Hayes, Inc.*, 677 *F.*2d. 301, 302 (1982). When the Supreme Court remanded *Coons* to the state court for determination of the commerce clause issue in light of *Searle*, the District Court adjourned its consideration of the same question pending a binding interpretation on a question of state law, namely, the

requirement of "representation" in our tolling statute, *N.J.S.A.* 2A:14-22. There followed our decision in *Coons I.*

As long ago as 1940 Chief Justice Charles Evans Hughes lamented that questions of retroactivity had for years been considered "among the most difficult" problems that engage the attention of the courts, both state and federal. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 *U.S.* 371, 371, 84 *L.Ed.* 329, 333. That the passage of time and a maturing of retroactivity law have not rendered those issues any the less vexatious is borne out by our experience in this case, in which after earnest reflection, aided by full briefing and argument, we now view as ill-considered our earlier statement (made without the benefit of an adversary hearing directed to the point) that gave *Coons I* retrospective effect. We are brought to that conclusion by application of principles drawn from our own state court decisions as well as from United States Supreme Court cases.

There are four common approaches to retroactivity that have emerged from our case law. A court may:

> (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted.
>
> [*State v. Burstein*, 85 *N.J.* 394, 402-03 (citing *State v. Nash*, 64 *N.J.* 464, 468-70 (1974)).]

Which of these approaches is taken depends largely on "the court's view of what is just and consonant with public policy in the particular situation presented." *State v. Nash*, 64 *N.J.* 464, 469 (1974). Most frequently "a weighing of the various policies involved [has] called for retrospectivity", *Darrow v. Hanover Twp.*, 58 *N.J.* 410, 413-14 (1971). Consequently, retrospectivity is acknowledged to be the "traditional" rule, *see, e.g., Mirza v. Filmore Corp.*, 92 *N.J.* 390, 396 (1983); hence our reference in *Coons I* to the "general rule" of retrospectivity as adverted to in *Fox v. Snow*, 6 *N.J.* 12, 14 (1950). 94 *N.J.* at 319

However, as suggested by *Nash, supra*, 64 *N.J.* at 469, sound policy reasons may persuade a court to accord a judicial decision prospective application. Under the rubric of *Nash*, followed in numerous cases since then, "sound policy grounds" may justify limiting the retroactive effect of overruling precedent. See *id.* at 471. They are (1) justifiable reliance by the parties and the community as a whole on prior decisions, (2) a determination that the purpose of the new rule will not be advanced by retroactive application, and (3) a potentially adverse effect retrospectivity may have on the administration of justice. *Mirza v. Filmore Corp., supra*, 92 *N.J.* at 397; *see, e.g., State v. Catania*, 85 *N.J.* 418, 447 (1981); *State v. Burstein, supra*, 85 *N.J.* at 406; *State v. Carpentieri*, 82 *N.J.* 546, 549 (1980).

Although more than one retroactivity analysis is available—in fact, as one scholar has recently pointed out, "there are several, with the precise number unclear and possibly changing", Corr, "Retroactivity: A Study in Supreme Court Doctrine 'As Applied'," 61 *N.C.L.Rev.* 745, 761 (1983)—it appears that New Jersey retroactivity law has been inspired by the same considerations that underlie retroactivity theory as developed by the Supreme Court. See *State v. Gervasio*, 94 *N.J.* 23 (1983); *Salorio v. Glaser*, 93 *N.J.* 447 (1983). On the specific

issue before us—whether a civil statute's invalidity is to be applied prospectively or retroactively—the Supreme Court has developed an equitable balancing test, perhaps best typified by *Chevron Oil Co. v. Huson*, 404 *U.S.* 97, 30 *L.Ed.*2d 296 (1971), and *Lemon v. Kurtzman*, 411 *U.S.* 192, 36 *L.Ed.*2d 151 (1973) (*Lemon II*).

Chevron involved a claim for personal injuries sustained while plaintiff was working on defendant's drilling rig located on the Outer Continental Shelf off the Gulf Coast of Louisiana. The suit was filed more than two years after plaintiff's accident. Louisiana had a one year statute of limitations governing personal injury suits. Originally, defendant did not raise a statute of limitations defense because the parties assumed, on the basis of a long line of federal decisions, that admiralty law—including the doctrine of laches—applied to the case. During discovery, however, the Supreme Court announced its decision in *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 *U.S.* 352, 23 *L.Ed.*2d 360 (1969), that state law, including state statutes of limitations, rather than admiralty law applied to personal injury actions brought under the Outer Continental Shelf Lands Act, relating to fixed structures on the Outer Continental Shelf. The District Court in *Chevron*, relying on *Rodrigue*, applied the Louisiana one-year limitations period and dismissed the case. The Circuit Court reversed and remanded for trial. In affirming that result the Supreme Court ruled that *Rodrigue* should be applied prospectively. The Court articulated three factors that influenced its decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the

> rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." * * * Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
>
> [404 *U.S.* at 106-07, 30 *L.Ed.*2d at 306 (citations omitted).]

Justice Stewart observed that inasmuch as *Rodrigue* not only was a case of first impression but also overruled prior lower court decisions that were binding, it was to be expected that plaintiff would rely on the law as it was "[w]hen [he] was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings * * *." *Id.* at 107, 30 *L.Ed.*2d at 306. The Court pointed to the substantial inequitable results that would be produced were *Rodrigue* given retroactive effect, since plaintiff stood to be barred from further relief because of a sudden change in the applicable statute of limitations. *Id.*

In *Lemon v. Kurtzman*, 403 *U.S.* 602, 29 *L.Ed.*2d 741 (1971) (*Lemon I*), the Supreme Court invalidated a Pennsylvania statutory program to reimburse nonpublic sectarian schools for designated secular educational service. In *Lemon II*, *supra*, 411 *U.S.* 192, 36 *L.Ed.*2d 151, the Court held that *Lemon I* should be accorded prospective effect. Chief Justice Burger, repeating *Chevron*'s comment that the Supreme Court had come to recognize the doctrine of non-retroactivity outside the criminal area many times, in both constitutional and non-constitutional cases, 411 *U.S.* at 197, 36 *L.Ed.*2d at 159-60, emphasized that reliance interests weigh heavily in the shaping of appropriate equitable relief. *Id.* at 203, 36 *L.Ed.*2d at 163. Particularly pertinent to today's inquiry is the Court's observation that "statutory or even

judge-made rules of law are hard facts on which people must rely in making decisions and shaping their conduct." *Id.* at 199, 36 *L.Ed.*2d at 160.

That *Chevron*'s underscoring of reliance continues as a significant feature of retroactivity analysis at the federal level is clear from *Wachovia Bank & Trust v. National Student Mktg.*, 650 *F.*2d 343 (D.C. Cir. 1980). The result in that case, which involved a suit under the federal securities law, turned on a determination of which of two statutes of limitations applied. Although the court had recently applied the shorter of the two, at the time the cause of action arose and plaintiff filed suit, the longer limitations period had been in use. Finding *Chevron*'s reliance factor to be "the most fundamental," 650 *F.*2d at 347, the court concluded that plaintiff was entitled to rely on the law as it was when suit was started. *Id.* at 348.

The development of New Jersey's retroactivity law has proceeded on a track roughly paralleling that represented by the cases discussed above. Indeed, one might fairly claim that *Oxford Consumer Discount Co. v. Stefanelli*, 104 *N.J.Super.* 512 (App. Div. 1969), modified, 55 *N.J.* 489, appeal dismissed, 400 *U.S.* 923, 27 *L.Ed.*2d 182 (1970), anticipated the *Chevron* and *Lemon II* analysis, at least to the extent of its heavy emphasis on the element of reliance.

> There is no question but that appellate courts in this State and elsewhere have long regarded themselves as empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness and justice, related to reasonable surprise and prejudice to those affected, seemed to call for such treatment.
>
> [104 *N.J.Super.* at 520.]

Our continued regard for the "reliance" factor is demonstrated by last term's decision in *Salorio v. Glaser*, 93 *N.J.* 447 (1983), *cert.* denied, 52 *U.S.L.W.* 3422 (U.S. Nov. 28, 1983) (No. 83-353), in which a unanimous Court declared the Emergency Transportation Tax Act, *N.J.S.A.* 54:8A-1 to -57, to be unconstitutional. In recognition, however, of the state's fiscal problem and of its reliance on the taxing statute as a significant revenue-raising law, we applied our ruling prospectively to allow the taxing authorities to collect the tax until January 1, 1984. Resorting to authority in support of the decision to invalidate statutory law, Justice Schreiber wove together the equitable considerations espoused in *Lemon II*, *supra*, 411 *U.S.* 192, 36 *L.Ed.*2d 151, and *Oxford Consumer Discount*, *supra*, 104 *N.J.Super.* 512, to find that fairness and reliance warranted prospective application. 93 *N.J.* at 464-65.

For other cases involving prospective application of decisions, see *New Jersey Bd. of Higher Educ. v. Shelton College*, 90 *N.J.* 470, 490 (1982) (enjoining unlicensed college from granting degrees but allowing award of credits and degrees to junior and senior students in recognition of students' pursuit of educational goals in "good faith" reliance on credibility of institution); *Passaic v. Local Fin. Bd.*, 88 *N.J.* 293, 303 (1982) (despite municipality's possible lack of good faith in adopting emergency appropriation request in violation of *N.J.S.A.* 40A:4-46, Court would not review appropriation and financing inasmuch as expenditures in reliance thereon could not be undone); *Jersey Shore v. Estate of Baum*, 84 *N.J.* 137, 152 (1980) (common-law principle of protecting wife from liability for husband's necessary expenses, without according similar protection to husband, invalidated on equal protection grounds; holding applied prospectively only to debts incurred after date of decision because of "primary factor" of "[r]eliance on the prior law"); *Barone v. Harra*, 77 *N.J.* 276, 281 (1978) (in view of reliance on prior law, Court's holding of com-

pensability under workers' compensation law for injuries sustained during lunch period applied prospectively); *Merenoff v. Merenoff*, 76 *N.J.* 536, 560 (1978) (abolition of interspousal tort immunity in personal injury actions applied prospectively); *Tomarchino v. Township of Greenwich*, 75 *N.J.* 62, 78 (1977) (invalidation of proof of dependency requirement in workers' compensation statute applied prospectively); *Mercer Council #4 v. Alloway*, 119 *N.J.Super.* 94, 101 (despite invalidation of Civil Service Commission rule, Commission's "substantial * * * reliance to date" on rule justified declaration that all prior actions as well as actions to be taken within 45 days of court's opinion would be valid), aff'd, 61 *N.J.* 516 (1972); *Darrow v. Hanover Twp., supra*, 58 *N.J.* at 420 (abrogation of interspousal tort immunity in automobile negligence actions applied prospectively).

III

In applying to this case the principles discussed in the preceding section, we are mindful of two admonitions in *Salorio v. Glaser, supra*, 93 *N.J.* 447. The first is perhaps obvious: that the ruling, the retrospective-prospective application of which is at issue, must be "the equivalent of a new rule of law." *Id.* at 464-65; see *State v. Burstein, supra*, 85 *N.J.* at 403 ("As the very term implies, retroactivity can arise only where there has been a departure from existing law."). The second may be more subtle but is of equal significance:

> It is important to recognize that we are acting within the framework of appropriate equitable relief with respect to an unconstitutional * * * statute and not with regard to the retrospective effect of a new rule of criminal procedure, *United States v. Johnson*, 457 *U.S.* 537, 102 *S.Ct.* 2579, 73 *L.Ed.* 2d 202 (1982); or a substantive constitutional principle, *United States v. United States Coin & Currency*, 401 *U.S.* 715, 91 *S.Ct.* 1041, 28 *L.Ed.*2d 434

(1971); or a rule of judge-made law applicable to civil proceedings, *Mirza v. Filmore Corp.*, 92 *N.J.* 390 (1983); *Cogliati v. Ecco High Frequency Corp.*, 91 *N.J.* 402 (1983). Factors that may be relevant in the criminal field, such as integrity of the judicial process, impairment of the basic purpose of the jury to determine the truth, or in the common law in civil matters in which other policy considerations are involved, may or may not be applicable here.

[93 *N.J.* at 463-64.]

The concerns expressed in this passage are related to what factors we select and what approach we take in deciding the issue before us. Defendant and the corporate *amici* argue that because our earlier ruling did not represent a "clear break with the past"—a prerequisite to prospectivity under *United States v. Johnson*, 457 *U.S.* 537, 73 *L.Ed.*2d 202 (1982)—we must give retroactive effect to *Coons I*. We do not agree.

Johnson held that, subject to limited exceptions, "a decision of [the Supreme] Court construing the Fourth Amendment [was] to be applied to all convictions that were not yet final at the time the decision was rendered." 457 *U.S.* at 562, 73 *L.Ed.*2d at 222. A fourth-amendment decision was to be applied retroactively unless it represented a "clear break with the past," as to which the Court said:

> Such a break has been recognized only when a decision (1) explicitly overrules a past precedent of this Court, or (2) disapproves a practice this Court arguably has sanctioned in prior cases, or (3) overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.
>
> [*Id.* at 551, 73 *L.Ed.*2d at 215 (citations omitted).]

Because, in the case before us, the law concerning the effect of the tolling statute on unlicensed foreign corporations was, at best, uncertain at the time plaintiff and the claimant-*amici* started suit, defendant argues that *Coons I* does not represent a "clear break" in any of the senses contemplated by *Johnson*.

Although this Court has adopted the *Johnson* "clear break" test in the context of a fourth amendment retroactivity issue, see *State v. Gervasio*, *supra*, 94 *N.J.* 23, we have not looked to strict "clear-break" analysis in the civil context, where the emphasis has been on considerations of fundamental fairness and justice. *See, e.g.*, *Salorio v. Glaser*, *supra*, 93 *N.J.* 447. Indeed, the final point of *Johnson* itself is that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron* * * *". 457 *U.S.* at 562, 73 *L.Ed.*2d at 222-23. And *Chevron*, as we have seen, *supra* at —— (slip op. at 13), tells us that for a decision to be applied non-retroactively, it is sufficient that it establish a new principle of law, "either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed." See *Johnson*, *supra*, 457 *U.S.* at 550 n.12, 73 *L.Ed.*2d at 214 n.12. *Chevron* does not use "clear-break" language. *See also Solem v. Stumes*, 55 *U.S.L.W.* 4307 (U.S. Feb. 29, 1984) (No. 81-2149) (affording prospective application to *Edwards v. Arizona*, 451 *U.S.* 477, — *L.Ed.*2d — (1984), which established *per se* rule that once suspect has invoked right to counsel, any subsequent initiation of conversation by one other than suspect violates that right; held, police could reasonably have relied on pre-*Edwards* law, which inquired into facts of each case, even though state of that law was unsettled; despite absence of "clear break," *Edwards* did establish new rule).

It is clear that *Coons I* satisfied the *Chevron-Salorio* formulation of how the requirement of establishing a

new principle of law may be met. We must look to the law as it was at the time plaintiff contemplated starting suit, namely, 1978. *See Wachovia Bank & Trust v. National Student Mktg., supra*, 650 *F.*2d at 347. In 1978 *N.J.S.A.* 2A:14-22 was in full bloom. It had been on the books since 1949, see *Coons I, supra*, 94 *N.J.* at 313, and a tolling provision in some form had been a fixture of our law for over a century and a half, its origins being traceable to 1820, see *Lemke v. Bailey*, 41 *N.J.* 295, 298 (1963). After *Coons I*, however, there was effectively no tolling provision for foreign, unrepresented corporations.

Until 1980, in *Velmohos v. Maren Eng'g Corp., supra*, 83 *N.J.* 282, this Court had not addressed the effect of *N.J.S.A.* 2A:14-22 on corporate defendants, having specifically declined to do so in *Lemke v. Bailey, supra*, 41 *N.J.* at 301. And although, as pointed out in both *Lemke, id.*, and *Velmohos, supra*, 83 *N.J.* at 286, that issue had yielded contradictory results in trial court decisions, *compare Ferraro v. Ferro Trucking Co., Inc.*, 72 *N.J.Super.* 519 (Law Div. 1962), *with Whalen v. Young*, 28 *N.J.Super.* 543 (Law Div. 1953), no appellate court anywhere had even hinted at a commerce clause problem until the Supreme Court's decision in *G.D. Searle & Co. v. Cohn, supra*, 455 *U.S.* 404, 71 *L.Ed.* 2d 250. Up to that point the only reported mention of commerce clause implications was tucked away in Judge Meanor's footnote in his *Searle* opinion, 447 *F.Supp.* at 911 n.17. Hence, the declaration of *Coons I* was hardly foreshadowed; and although the case did not literally alter precedent because there was none on the *holding* of the case, it amounted to a "statement" in a matter of first impression—and thus "new law."

> The overruling of prior judicial construction of a statute is generally not given retroactive effect, even as legislative change itself normally applies only prospectively. Although we are not literally altering

> precedent, the principle in this matter of first impression appears to us to be indistinguishable in view of that which appears almost incontestably to have been a not wholly unreasonable reliance on a contrary doctrine.
>
> [*Turner v. Aldens, Inc.*, 179 *N.J.Super.* 596, 605 (App. Div. 1981) (citation omitted).]

Turning to the critically important factor of reliance, we focus at the outset on what it is that litigants "may have relied" on in 1978—a long-standing statute that announces that as to foreign, unrepresented corporations, no action need be taken. The effect of the statute is to give assurance that causes of action against foreign, unrepresented corporations will be preserved. In a sense its underlying subject is non-action. To be sure, it would be most difficult, if not impossible, to forecast the number of claimants who might be affected by a holding that *Coons I* should be applied retroactively or, as the Attorney General points out, to measure "the extent and nature of the prejudice to be suffered by those potential plaintiffs who justifiably relied on the validity of the tolling statute."

Despite those difficulties, we conclude that given the nature of this statute, we are justified in presuming that because of the tolling feature, many suits may not have been brought against unrepresented foreign corporations. The foreign corporations did not take any action to avoid whatever vulnerability the enactment created; they did not register in New Jersey. The history of non-action by both those corporations and potential plaintiffs satisfies us that participants in the events before us ordered their affairs in accordance with the tolling statute.

Moreover, this conclusion has the virtue of practicability: we cannot construct a workable rule by questioning, in each case, whether the particular plaintiff has successfully demonstrated actual reliance. Some level of

generality is required. The result we achieve satisfies that need while at the same time honoring the equitable considerations that must inform our decision.

Finally, following *Chevron, supra*, 404 *U.S.* at 106-07, 30 *L.Ed.*2d at —, we look to the purpose of the rule in *Coons I.* In its starkest terms, that determination had as its purpose the outlawing of so much of the tolling statute as violates the commerce clause. Defendant contends that not to apply the ruling retroactively would be to countenance unconstitutionality. But the argument overlooks the balancing of interests and impact, called for by our commitment to equitable principles. Those concerns are addressed above—the reliance of plaintiff and those similarly situated, and the absence of any showing that in fact defendant and corporate *amici* suffered a burden borne of a compulsion to register in New Jersey to permit recourse to the statute of limitations. On balance we are satisfied that the purpose of the prior ruling is fulfilled by excluding from the scope of the *Coons I* ruling only those actions already commenced as of August 3, 1983.

That leaves for determination only the question of whether *Honda*, as the successful litigant in *Coons I*, or any of the corporate *amici* as champions of the cause, should be given the benefit of the ruling in *Coons I.* We conclude not. Prospectivity is to be accorded "across the board." Whereas ordinarily the fruits of the struggle are awarded the successful litigant, and likewise to one—here Searle and Kelsey-Hayes—with whom the prevailing theory originated or who, like Brinco, has with great tenacity and persistence espoused the cause—we perceive no injustice in limiting the operative time of *Coons I* to the date of that decision, August 3, 1983. Defendant and *amici* are institutional litigants. They are of a class that will in the future frequently have resort to the statute of limitations, unimpeded by so much of *N.J.S.A.* 2A:14-22 as deprived them of that benefit. In

addition, the hiatus effected by our conclusion in this regard affords the Legislature an opportunity to address any public policy concerns that are implicated by *Coons I*.

Our prior judgment in *Coons I*, under the terms of which the cause was remanded to the Law Division for entry of judgment for defendant Honda, is modified. *Coons I* is to be made effective as of August 3, 1983—that is, the statute of limitations as to foreign, unrepresented corporations commences to run as of that date. The cause is remanded to the Law Division for further proceedings consistent with this opinion.

Chief Justice Wilentz and Justices Handler and O'Hern join in this opinion. Justice Garibaldi has filed a separate dissenting opinion in which Justices Schreiber and Pollock join in Part I.

GARIBALDI, J., dissenting.

On August 3, 1983 in *Coons v. American Honda Motor Co.*, 94 *N.J.* 307 (1983) (*Coons I*), we held that *N.J.S.A.* 2A:14-22 imposes an unconstitutional burden on interstate commerce in violation of the commerce clause, U.S. Const. art. 1, § 8, cl. 3. We further stated that this decision "should be given retrospective effect, consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment." *Id.* at 319. Today, less than 8 months later, the majority reverses our decision in *Coons I* with respect to retroactivity and holds that the decision in *Coons I* should be applied prospectively to all parties from the date of that decision August 3, 1983. We disagree.

Justices Schreiber and Pollock would apply our decision in *Coons I* retroactively to all parties presently before the Court including *amici*: G.D. Searle & Co., Kelsey-Hayes Co. and Brinco Mining Limited, but would apply the decision prospectively as to everyone else. I

agree with my dissenting brethren, but would go further and accord our *Coons I* decision retroactive effect "across the board."

I

Irrespective of the general retroactivity of the *Coons I* decision, there should be no question that those responsible for effecting the change in law should benefit by their efforts. It has long been the position of this Court that "fundamental fairness" compels that "champions of the cause" should be rewarded for their effort and expense in challenging existing law. We need private attorneys to push forward the frontiers of the law, but we will not have them if they stand to gain nothing through their efforts.

As we have held in *Goldberg v. Traver*, 52 *N.J.* 344, 347 (1968), "[u]nless the immediate litigant can hope to gain, there would be no incentive to challenge existing practices or prior holdings which, in the public interest ought to be reviewed." And as Chief Justice Weintraub observed in *Willis v. Department of Cons. & Econ. Dev.*, 55 *N.J.* 534, 541 (1970):

> As to the plaintiffs in this case, the decision should be applied, and this for the practical reason that case law is not likely to keep up with the needs of society if the litigant who successfully champions a cause is left with only that distinction.

This Court set forth similar policy reasons when we held that our decisions would be prospectively applied, except as to the litigants before the Court, in the following cases: *Cogliati v. Ecco High Frequency Corp.*, 92 *N.J.* 402, 417 (1983) (decisions extending responsibility of predecessor in title for maintenance of public sidewalks, applied prospectively except as to parties); *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 82-83 (1982) (overruling of prior decision in *Point Pleasant Beach Teachers' Ass'n v. Callan*, 173 *N.J.Super.* 11,

certif. den., 84 *N.J.* 469 (1980), applied prospectively except as to parties before court); *Pascucci v. Vagott*, 71 *N.J.* 40, 50-51 (1976) (setting aside of classification standards under welfare statute applied prospectively except as to litigants); and *Darrow v. Hanover Township*, 58 *N.J.* 410, 420 (1971) (abrogation of doctrine of interspousal immunity in automobile negligence cases applied prospectively except as to litigants).

Recently, we held that as a matter of fundamental fairness a new rule of strict liability in a products liability case should be extended to all plaintiffs similarly situated. *Ramirez v. Amsted Industries*, 86 *N.J.* 332 (1981). In *Ramirez* we said:

> Therefore, we apply the new rule to the present case and its companion, *Nieves v. Bruno-Sherman Corp. & Harris Corp.*, 86 *N.J.* 361. Moreover, we conclude that on balance *and as a matter of fundamental fairness*, the benefit of today's rule should be extended to other similarly situated plaintiffs with products liability suits against successor manufacturers affected by this rule, which suits were in progress as of November 15, 1979, the date of the Appellate Division decision. There is a *basic justice* in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims—not yet resolved when the new rule of law is announced—are ultimately vindicated. (emphasis added) [*Id.* at 357.]

The fundamental principles of basic fairness contemplated by this Court in *Ramirez* are particularly appropriate in the instant case. For years the parties here have waged protracted legal battles over the constitutionality of the tolling statute. Defendant Honda has been fighting this suit for over 5 years. It has been an extraordinarily hard fought battle in both the state and federal courts, as a brief history of the litigation demon-

strates. The majority opinion, *ante* at — (slip op. at 5-6), sets forth the procedural history of this case. That history reveals: arguments in this state's trial court and Appellate Division; denial of cross-motions for leave to appeal to this Court; vacation of the judgment and remand by the United States Supreme Court; certification by this Court on our own motion; our *Coons I* decision, declaring that the tolling statute unconstitutionally burdens interstate commerce and that our decision should be given retroactive effect; and finally, this case, *Coons II*, a rehearing of the retroactivity issue only. Even the most superficial glance at this procedural history indicates that the road to today's decision has been a tortuous one.

The *amici* likewise have engaged in an extraordinarily protracted and tenacious pursuit of this issue through the Federal District Court to the United States Court of Appeals and finally to the United States Supreme Court. As the majority recognizes, Searle and Kelsey-Hayes are the originators of the prevailing commerce clause theory and Brinco has persistently espoused the cause. *Ante* at — (slip op. at 26).

Certainly Searle and Kelsey-Hayes have "championed the cause." They have challenged the constitutionality of this statute longer than any other party. But for the Supreme Court decision in *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404, 102 *S.Ct.* 1137, 71 *L.Ed.*2d 250 (1982) and the subsequent remand of the *Coons* case, the commerce clause issue would not have been decided by this Court at this time.

Brinco likewise long has challenged the tolling statute's constitutionality. It joined the *Searle* case as an *amicus* in the Supreme Court and filed an *amicus* brief devoted exclusively to the commerce clause. After the Supreme Court remanded *Coons* to the Appellate Division in light of its decision in *Searle*, Brinco obtained leave to file an *amicus* brief and to argue before us.

Given the especially long and arduous history of this appeal, there is no valid reason to depart from established judicial principles. Basic justice and principles of fundamental fairness demand that the defendant and *amici* in this case have the *Coons I* decision applied retroactively to them. When a statute's unfair and discriminatory features render it offensive to the supreme law of our land, it is just to resolve the matter so that the challenging litigants be spared further constitutional deprivation. Only in this fashion may the unconstitutional burden which has heretofore been placed upon them be eradicated.

The majority's excuse for not applying these well-recognized standards to the defendant and *amici* is that they are institutional litigants and hence will suffer no injustice. Whatever merit attends that argument is insufficient to carry the day. All litigants should be treated equally before the courts. Moreover, defendant and *amici* certainly will suffer an injustice if *Coons I* is not applied to them retrospectively. Under today's decision not only the present plaintiffs in this action and in cases in which *amici* are involved will have an unconstitutional cause of action, but until August 3, 1985 (two years from our decision in *Coons I*) plaintiffs who have sat on their rights will be able to institute actions against these parties and impose additional unconstitutional burdens upon them.

II

While my fellow dissenters would limit the retroactive application of *Coons I* to the parties before the Court today, I would go further; I would hold that *Coons I* should be given complete retroactive effect. This Court has generally adhered to the principle that "the presumption is in favor of retrospectivity, and that presumption can be overcome only by a clear demonstration in a particular case that there are sound policy reasons for according to a judicial decision prospective application

only." *Cogliati v. Ecco High Frequency Corp., supra,* 181 *N.J.Super.* at 583. In my opinion, plaintiffs have failed to meet their burden of demonstrating good reasons for prospective application in this case. *See Mirza v. Filmore Corp.*, 92 *N.J.* 390, 396-97 (1983); *Busik v. Levine*, 63 *N.J.* 351, 360-61, app. dism. 414 *U.S.* 1106, 94 *S.Ct.* 831, 38 *L.Ed.*2d 733 (1973); *Darrow v. Hanover Township*, 58 *N.J.* 410, 413 (1971); *Fox v. Snow*, 6 *N.J.* 12, 14 (1950); *Ross v. Board of Chosen Freeholders of Hudson City*, 90 *N.J.L.* 522 (E. & A. 1917); *Goncalvez v. Patuto*, 188 *N.J.Super.* 629, 626 (App. Div. 1983); *Cogliati v. Ecco High Frequency Corp., supra*, 181 *N.J.Super.* at 582.

Our law of retroactivity is based on the same considerations that underlie retroactivity theory of the Supreme Court. In civil actions, we have recognized standards similar to the tests set forth in *Chevron Oil Co. v. Huson*, 404 *U.S.* 97, 92 *S.Ct.* 349, 30 *L.Ed.*2d 296 (1971). In that case the Supreme Court looked to three factors to determine the retroactivity question: (1) whether the decision establishes a "new principle of law;" (2) whether retroactive operation of the decision would further or retard the purpose of the new rule; and (3) whether retroactive application would work an injustice upon those who had reasonably relied upon the old rule. 394 *U.S.* at 106-107, 92 *S.Ct.* at —, 30 L.Ed. 2d at 306; *see Mirza v. Filmore Corp.*, 92 *N.J.* 390, 397 (1983) (applying similar test when overruling prior judicial precedent in civil action); *see also State v. Burstein*, 85 *N.J.* 394, 406 (1981) (applying similar test in the context of changing interpretation of criminal statute).

The threshold issue in any retroactivity decision is whether or not a new rule of law or judicial principle has been announced. In defining the threshold question in the court context, we have consistently followed the liberal "new rule of law" standard set forth in *Chevron. See Salorio v. Glaser*, 93 *N.J.* 447, 465 (1983).

Although the tolling statute had been criticized and court decisions challenged its constitutionality, my review of the statute's history and the relevant cases leads me, as it did the majority, to conclude that our decision in *Coons I* amounted to a statement of first impression. Therefore, applying the first *Chevron* test, I agree with the majority that the decision in *Coons I* established a new rule of law.

My disagreement with the majority stems from my belief that it is improperly applying the second and third tests of *Chevron*. Turning to an examination of the second *Chevron* test, the prospective application of *Coons I* clearly frustrates the purpose of that decision. In applying *Coons I* prospectively, the majority ignores that its purpose was to strike down an unconstitutional statute. Today the majority countenances the very unconstitutionality that we sought to abrogate in *Coons I*. When the very law that prejudices the litigant cannot withstand a constitutional challenge, only extraordinarily strong policy reasons (as present in *Salorio*) justify limiting the new rule to prospective application.

The majority primarily bases its holding upon its analysis of the third *Chevron* factor and erroneously holds that retroactive application would be unjust to the plaintiff in this case because of his reliance upon the unconstitutional statute. An examination of the record discloses, however, that the parties in this case did not place any reliance whatsoever upon the tolling statute. Plaintiff Coons brought suit against Honda as soon as he realized that he had a cause of action; *Amicus* Cohn did not file suit immediately because he believed that the theory of causation was too tenuous. Finally, Roy Hopkins asserted that he was unaware that he might have a cause of action against Kelsey-Hayes, Inc., until after the statute of limitations had run.

Today the majority holds that actual reliance need not be shown, but that the potential for reliance is sufficient

to trigger a prospective application of the rule. *Ante* at —— (slip op. at ——). I disagree. In the past we have required a showing of actual reliance before limiting a new decision to purely prospective effect. *Wangler v. Harvey*, 41 *N.J.* 277, 286 (1963) (no evidence of actual reliance by defendant); *Arrow Builders Supply Corp. v. Hudson Terrace Apts.*, 16 *N.J.* 47, 50 (1954) (record contained nothing to suggest party actually relied upon old rule). I would require actual reliance or at least a reasonable likelihood of reliance before I would allow this factor to determine whether a decision should be applied retroactively or prospectively.

III

In conclusion, I still hold to our presumption of retroactivity. The reason for the presumption is that in most instances the advancement of the purpose of the new ruling is best served and the equities are not substantially disserved by applying the ruling to all actions. This general rule is clearly applicable to the present case.

Here the purpose of our ruling was to correct an unconstitutionally discriminatory statute. The Court's decision, to apply that ruling prospectively only, does nothing to advance the equities of this case since, as we have seen, the parties did not rely on the old rule. The decision, however, does delay the effect of the new rule, and thereby retards its purpose.

I would not give these or other plaintiffs who slept on their rights a windfall action allowing them to sue foreign corporations for another year without any showing that they either knew or relied on our statute. The proper remedy for these plaintiffs is the discovery exception to the statute of limitations. If they cannot succeed under that provision, they should not be allowed to succeed under this one. New Jersey cannot afford to create inconsistent decisions based on this Court's desire to give

a certain class of plaintiffs a remedy to which they are not entitled.

Justice Schreiber and Justice Pollock join in Part I of this opinion.

APPENDIX B

SUPREME COURT OF NEW JERSEY

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94 N.J. 307

WALTER P. COONS,
Plaintiff-Respondent,

v.

AMERICAN HONDA MOTOR CO., INC.,
a corporation, *et al.*,
Defendants,

and

HONDA MOTOR COMPANY, LTD. OF JAPAN, a corporation,
Defendant-Appellant,

and

ATTORNEY GENERAL OF NEW JERSEY,
Intervenor-Respondent.

Argued Feb. 23, 1983

Decided Aug. 3, 1983

John I. Lisowski, Livingston, for defendant-appellant (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, Livingston, attorneys).

Robert H. Jaffe, Springfield, for plaintiff-respondent Jaffe & Schlesinger, Springfield, attorneys (Robert H. Jaffe, Howard G. Schlesinger, and Louis A. DiMare, Jr., Irvington, on the brief).

Harry Haushalter, Deputy Atty. Gen., for intervenor-respondent (Irwin I. Kimmelman, Atty. Gen., attorney; James J. Ciancia, Asst. Atty. Gen., of counsel; Harry Haushalter and Adrienne L. Isacoff, Deputy Atty. Gen., on the brief).

I. Michael Greenberger, Washington, D.C., a member of the Dist. of Columbia bar, for amicus curiae Brinco Min. Ltd. (Lum, Biunno & Tompkins, Newark, attorneys).

Raymond M. Tierney, Jr., Shrewsbury, submitted a brief on behalf of amicus curiae G.D. Searle & Co. (Shanley & Fisher, Newark, attorneys).

Walter R. Cohn, South Orange, submitted a brief on behalf of amici curiae Walter Cohn and Susan Cohn (Walter R. Cohn, attorney; Thomas E. Cohn, South Orange, on the brief).

Philip A. Tortoreti, Elizabeth, submitted a brief on behalf of amicus curiae Karl Asch, (Karl Asch, Elizabeth, attorney).

The opinion of the Court was delivered by

CLIFFORD, J.

This appeal addresses the interpretation and validity, in the context of the Commerce Clause, of *N.J.S.A.* 2A:14-22, which tolls the running of the applicable statute of limitations in actions against foreign corporations that are not "represented" in this state. Before reaching the constitutional question we must determine how a foreign corporation may be "represented" in New Jersey in order to avoid the tolling provision. We hold that a foreign corporation must obtain a certificate to do business

in this state, under *N.J.S.A.* 2A:13-4, in order to achieve "representation" in the context of *N.J.S.A.* 2A:14-22. Further, we hold that *N.J.S.A.* 2A:14-22 unconstitutionally burdens interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain a certificate to do business in order to gain the advantage of the statute of limitations.

I

Plaintiff commenced this suit in 1978 against defendant Honda Motor Co., Ltd. (Honda) and its wholly-owned American distributor, American Honda Motor Co., Inc. (American Honda). The action seeks damages for personal injuries and consequential losses occasioned by an accident on October 30, 1974, when plaintiff was thrown from a motorcycle manufactured by Honda and distributed by American Honda. At all relevant times American Honda was a California corporation that maintained facilities in New Jersey. In contrast, Honda is a Japanese corporation that has never been authorized to do business in this or any other state and carries on no activities here or elsewhere in the United States.

Because plaintiff had started suit four years after the accident, both Honda and American Honda raised as a defense the two-year statute of limitations for personal injury actions, *N.J.S.A.* 2A:14-1, and moved for summary judgment. The trial court granted American Honda's motion but denied that of Honda, ruling that the two-year statute of limitations had been tolled by *N.J.S.A.* 2A:14-22 because Honda was a foreign corporation that was not "represented" in New Jersey by a person upon whom process could be served.[1] In addition, the

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[1] *N.J.S.A.* 2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified * * * is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times

trial court held that there were sufficient bases for the exercise of *in personam* jurisdiction against Honda and that the tolling statute did not violate the equal protection clause of the federal Constitution.

The Appellate Division affirmed the judgment of the trial court. *Coons v. Honda Motor Co., Ltd., of Japan*, 176 *N.J.Super.* 575, 424 *A.*2d 446 (1980). After this Court denied cross-motions for leave to appeal, the parties sought review by the Supreme Court, which consented to hear only Honda's appeal. That Court vacated the judgment below and remanded to the Appellate Division. *Honda Motor Co., Ltd. v. Coons*, 455 *U.S.* 996, 102 *S.Ct.* 1625, 71 *L.Ed.*2d 857 (1982). Thereafter we certified the cause on our own motion. *R.* 2:12-1.

That this appeal may be set in its proper context we digress briefly from this chronological recitation to focus on the action of the Supreme Court. The purpose of that Court's remand was to afford the New Jersey court opportunity for reconsideration in light of the Supreme Court's decision in *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404, 102 *S.Ct.* 1137, 71 *L.Ed.*2d 250 (1982), a case raising precisely the same issue as is presented here. In *Searle*, the Supreme Court held that *N.J.S.A.*

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limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served,* when such cause of action accrues or at any time before the expiration of the times so limited, *the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation (emphasis added).

2A:14-22 survived equal protection and due process challenges. The Court did not resolve the commerce clause challenge, however, stating that the issue was "clouded by an ambiguity in state law" concerning the requirement of representation under the statute.[2] *Id.* at 413, 102 *S.Ct.* at 1144, 71 *L.Ed.*2d at 259. Justice Blackmun wrote that the ambiguity was created by the following language in a footnote in this Court's opinion in *Velmohos v. Maren Eng'g Corp.*, 83 *N.J.* 282, 416 *A.*2d 372 (1980), in which we held the tolling statute constitutional in the face of equal protection and due process attacks: "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 *N.J.* at 293 n.10, 416 *A.*2d 372. Justice Powell dissented from so much of *Searle* as discussed the Commerce Clause. He found the *Velmohos* footnote unambiguous, stating that it was "simply a neutral observation that says *nothing* as to the means of designation of an agent under New Jersey law." 455 *U.S.* at 416, 102 *S.Ct.* at 1145, 71 *L.Ed.*2d at 261 (emphasis in original).

However unfortunate our failure to articulate clearly our position in the *Velmohos* footnote, our intention was, as accurately perceived by Justice Powell, to make no more than a "neutral observation." At least that was our intention as currently recalled by three members who vote with this opinion and who also sat in the *Velmohos* case, and as *appears* to the other majority member to have been the intention of the *Velmohos* Court. That we were not entirely successful in expressing that intention is now all too painfully apparent. Although it may be "clear" to our dissenting colleagues what it was that the

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[2] The Supreme Court remanded *Searle* to the Court of Appeals for the Third Circuit to consider the possible commerce clause violation. That court remanded the matter to the District Court for the District of New Jersey, which subsequently adjourned the matter pending a binding state court interpretation of the "representation" requirement.

Velmohos footnote was meant to mean, it should suffice to point out that it was not at all clear to a majority of the Supreme Court, to say nothing of the fact that five of us who participated in *Velmohos* cannot now agree upon what it was we were saying in footnote 10. And what we said there takes on considerable significance in this case.

II

We are called upon to examine the suggested forms of representation that would permit a foreign corporation to avoid the tolling statute and avail itself of the statute of limitations. The parties discuss three procedures by which a foreign corporation can gain representation: (1) obtaining a certificate of authority to transact business in the state; (2) merely designating an agent without filing notice thereof with a government agency or official; (3) filing with the Secretary of State a notice designating a representative to accept service of process.

It is indisputable that a foreign corporation can gain the benefit of the statute of limitations by receiving a certificate of authority to do business under *N.J.S.A.* 14A:13-4.[3] The issue is whether another statutorily-authorized procedure exists that would establish representation for the limited purpose of avoiding the tolling effect of *N.J.S.A.* 2A:14-22.

Plaintiff looks to the language of *R.* 4:4-4(c)(1) as support for its contention that foreign corporations need only appoint an agent for service of process in New Jersey, rather than register to do business here. That Rule substantially tracks the language of the former stat-

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[3] A foreign corporation that procures such a certificate is then generally amenable to suit in New Jersey, *see N.J.S.A.* 14A:13-4(1)(d); is required to maintain a registered agent and office, *N.J.S.A.* 14A:4-1, and to notify the Secretary of State of any changes thereof, *N.J.S.A.* 14A:4-3; must file annual reports, *N.J.S.A.* 14A:4-5; and is subject to an annual franchise tax, *N.J.S.A.* 54:10A-2.

utes, *R.S.* 2:26-43 to -44, which were amended in 1948 to provide for service on corporations.[4] Notwithstanding these statutory amendments, when the legislature in 1949 amended the tolling statute to provide the exemption for corporations represented in the state, it chose not to incorporate the concept of "long-arm" jurisdiction that had been sanctioned by the Supreme Court in *International Shoe Co. v. Washington*, 326 *U.S.* 310, 66 *S.Ct.* 154, 90 *L.Ed.*2d 95 (1945). "Long-arm" service over corporations was not adopted until 1958, by then *R.R.* 4:4-4(d) (now *R.* 4:4-4(c)(1)). See discussion *infra* at 925. Even a cursory examination of the Rule discloses that it does not purport to serve the purpose of announcing where an identified agent can be found. It in no wise discusses the designation of an agent. An uninformed plaintiff would be faced with the virtually impossible task of locating the unknown appointee and would, in effect, lose the protection that the tolling provision is designed to afford. In addition, the Rule does not provide

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[4] Under *R.* 4:4-4(c)(1), service shall be made as follows:

> Upon a domestic or foreign corporation, by serving, in the [general] manner * * *, either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporations; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

an independent basis for the designation of an agent to accept service—it merely directs service on a person so designated.

Plaintiff argues that a mechanism that provides notice can be found in *N.J.S.A.* 14A:1-6(4), which reads in relevant part as follows: "The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office." The Secretary of State previously held the view that unless a foreign corporation has qualified to do business in the state, it would be unable to designate a registered agent for service of process.[5] Recently, however, the Secretary has acceded to the Attorney General's contrary position that in accordance with *N.J.S.A.* 2A:14-22, a foreign corporation may file with the Secretary of State a notice designating a representative in New Jersey as its agent to accept service of process.

Implicit in the Attorney General's interpretation is the notion that the tolling statute authorizes foreign corporations to designate agents without registering to do business in the state. Without such authorization foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because that statute directs the Secretary to *record* documents that are filed

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[5] Counsel for Searle obtained—and filed with the Supreme Court—an opinion from the New Jersey Secretary of State determining, in effect, that the registration statute, *N.J.S.A.* 14A:14-1, was the *only* means of designating a registered agent for service of process. The opinion reads:

> In response to your recent letter, please be advised that it is the view of the Department of State that unless a foreign corporation has qualified to do business in New Jersey, they are unable to designate a registered agent for service of process.

Letter from Frank Capece, Executive Assistant to the New Jersey Secretary of State, to James H. Freis, Esq., (Oct. 22, 1981), cited in *Searle*, 455 *U.S.* at 417, 102 *S.Ct.* at 1146, 71 *L.Ed.*2d at 261.

as required or permitted by law. It does not independently authorize the *filing* of any documents. Inasmuch as there is nothing in *N.J.S.A.* 2A:14-22 or any other section or rule that authorizes the designation of an agent without registering to do business in the state, we conclude that a foreign corporation cannot file with the Secretary of State notice designating a representative as its agent to accept service of process under *N.J.S.A.* 14A:1-6(4).

Plaintiff also contends that the legislative history to the predecessor of *N.J.S.A.* 2A:14-22 supports the position that a foreign corporation need not register to do business in the state in order to designate an agent for service of process. As indicated *supra* at 924, in 1949 the tolling statute was amended and for the first time dealt specifically with a corporate defendant. The amendment excepted from the statute domestic corporations and those foreign corporations maintaining representatives in New Jersey. See *Velmohos v. Maren Eng'g Corp., supra*, 83 *N.J.* at 289, 416 *A.*2d 372. The statement accompanying the amendment reads as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions. [Statement Accompanying Assembly No. 467 (1949) (*quoted in Velmohos*, 83 *N.J.* at 290, 416 *A.*2d 372).]

Plaintiff focuses on the language alluding to "a similar change" in New York law. That change had been interpreted to except from the tolling provision those foreign corporations that had appointed agents for service of process but had not registered to do business in New York.

Although plaintiff asserts that reference to the New York amendment evidences intent to allow a foreign corporation to appoint an agent for service of process without registering to do business in New Jersey, it is abundantly clear to us that New Jersey's statute was meant to be "similar" to New York's, not "identical." Moreover, we give great weight to the clear expression of legislative intent found in the first two sentences of the statement accompanying the amendment—the purpose was to provide foreign corporations *licensed to do business* in New Jersey the benefit of the statute of limitations—in concluding, as did Justice Powell in his separate opinion in *Searle*, that "foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business." 455 *U.S.* at 419, 102 *S.Ct.* at 1147, 71 *L.Ed.*2d at 262-63.[6]

III

Having established the means by which a foreign corporation represents itself in order to gain the benefit of the statute of limitations, we now address the Commerce Clause issue: is interstate commerce unconstitutionally burdened by the requirement that in order to avoid the effect of *N.J.S.A.* 2A:14-22, a foreign corporation must qualify to do business in New Jersey?

As Professor Tribe discusses, in most cases "[s]tate regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate

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[6] Significantly, the dissent simply ignores the critical specific language of the statement accompanying the 1949 amendment. As the dissent correctly observes, the purpose of the amendment was to create a situation of "even footing," *post* at 933; however, that equality was to be enjoyed by domestic corporations and foreign corporations *licensed to do business* in the state, not those with, in the words of the dissent, "agents for process in New Jersey." *Id.* Because our interpretation is perfectly consistent with the unambiguous declaration of the legislature, we fail to perceive the "irony" that troubles our dissenting collegaues. *Id.*

state end, and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation." L. Tribe, *American Constitutional Law* § 6-5 at 326 (1978 ed.). *See Pike v. Bruce Church*, 397 *U.S.* 137, 90 *S.Ct.* 844, 25 *L.Ed.*2d 174 (1980); *South Carolina State Highway Dept. v. Barwell Bros.*, 303 *U.S.* 177, 58 *S.Ct.* 510, 82 *L.Ed.* 734 (1938). Notwithstanding that general rule, the Supreme Court has invalidated state statutes, without balancing the competing interests, as *per se* violations of the Commerce Clause in the area of licensing requirements imposed on foreign corporations involved in interstate commerce. In a series of decisions the Supreme Court has held that a state cannot discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. *See Allenberg Cotton Co. v. Pittman*, 419 *U.S.* 20, 95 *S.Ct.* 260, 42 *L.Ed.* 2d 195 (1974); *Dahnke-Walker Milling Co. v. Bondurant*, 257 *U.S.* 282, 42 *S.Ct.* 106, 66 *L.Ed.* 239 (1921); *Sioux Remedy Co. v. Cope*, 235 *U.S.* 197, 35 *S.Ct.* 57, 59 *L.Ed.* 193 (1914). Because the statute involved in this case similarly limits a right to those corporations that are licensed regardless of the nature of their business (interstate or intrastate), we consider it in the light of those precedents.[7]

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[7] Although not necessary to our decision, we note that *N.J.S.A.* 2A:14-22 would violate the commerce clause under a balancing analysis. The burdens attached to the requirement of obtaining certification to do business in order to avoid the tolling of the statute of limitations, see note 3 *supra*, at 924, outweigh the benefits that flow from that tolling provision, see *Searle*, 455 *U.S.* at 410, 102 *S.Ct.* at 1142, 71 *L.Ed.*2d at 257. Because of our resolution of the "representation" issue, we need not address the dissent's balancing of the benefits against the burden of appointing an agent for service of process rather than obtaining a certificate to do business. See *post* at 930.

The *Allenberg* line of cases involved statutes that conditioned the right to sue in state court on a license requirement, regardless of the nature of the business of the foreign corporation. The challengers in each case had attempted to sue in state courts to enforce contracts for the interstate sale of goods. In striking down a Kentucky statute that prevented such a suit, the *Dahnke-Walker* Court held that

> [a] corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. [257 *U.S.* at 291, 42 *S.Ct.* at 109, 66 *L.Ed.* at 244.]

The Supreme Court spoke in broad terms, declining to limit its decision to the "right to sue" context. Instead, the Court focused on the importance of leaving interstate commerce unfettered. As applied to this case that principle gives rise to the question whether the denial of the statute of limitations defense to unlicensed foreign corporations impermissibly—even though indirectly—forces those corporations to obtain a license to do business in the state.

There is no fundamental right to a statute of limitations defense. In holding the tolling provision constitutional under the less rigorous equal protection standard, the *Searle* court stated:

> [Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a rela-

> tively large degree of legislative control. [455 *U.S.* at 408, 102 *S.Ct.* at 1141, 71 *L.Ed.*2d at 256, quoting *Chase Sec. Corp. v. Donaldson*, 325 *U.S.* 304, 314, 65 *S.Ct.* 1137, 1142, 89 *L.Ed.* 1628 (1948) (brackets in original).]

That legislative control, however broad, must be subject to constitutional limits. The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

The tolling statute, *N.J.S.A.* 2A:14-22, is a forced-licensure provision. Therefore, it must be struck down as a violation of the Commerce Clause. This decision should be given retrospective effect, consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment. *See Fox v. Snow*, 6 *N.J.* 12, 14, 76 *A.*2d 877 (1950).

Reversed. The cause is remanded to the Law Division for entry of judgment for defendant Honda.

SCHREIBER and O'HERN, JJ., dissenting.

We disagree with the majority's view that the only way that a foreign corporation may appoint an agent for service of process, and thereby obtain the benefit of the statute of limitations, is to obtain a certificate of authority to transact business in the State.

We disagree as well with the Supreme Court characterization of footnote 10 of *Velmohos v. Maren Engineering Corp.*, 83 *N.J.* 282, 293 n.10, 416 *A.*2d 372 (1980), as "opaque." *See G.D. Searle & Co. v. Cohn*, 455 *U.S.*

404, 414, 102 *S.Ct.* 1137, 1144, 71 *L.Ed.*2d 250, 259 (1982). It is clear to us that a majority of the *Velmohos* Court determined that under New Jersey law all that is required of a foreign corporation to obtain the general benefits of our statute of liimtations is that it appoint an agent for service of process, not that it submit to the general jurisdiction of the forum by obtaining a certificate of authority to do business.

I.

In *Velmohos* we upheld *N.J.S.A.* 2A:14-22, which provides for the tolling of the statutes of limitations with respect to claims against foreign corporations that are "not represented in this state by any person or officer upon whom summons or other original process may be served." We held that the section did not violate the constitutional Equal Protection or Due Process Clauses when applied to a foreign corporation that is not "represented" in New Jersey, but is subject to long-arm jurisdiction by service outside the State. The United States Supreme Court affirmed this holding in *Searle*, 455 *U.S.* at 412 & n.7, 102 *S.Ct.* at 1143-44 & n.7, 71 *L.Ed.*2d at 258 & n.7, but considered it unwise to pass on the claim of a Commerce Clause violation not raised below and remanded the *Searle* case to the Circuit Court of Appeals to determine whether the Commerce Clause argument had merit. *Id.* at 412-14, 102 *S.Ct.* at 1143-44, 71 *L.Ed.*2d at 258-59. The Supreme Court also vacated and remanded *Velmohos* to this Court for further consideration in light of *Searle*. 455 *U.S.* 985, 102 *S.Ct.* 1605, 71 *L.Ed.*2d 844 (1982). The case was settled before reconsideration.

In *Velmohos* Justice Pashman carefully observed "that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 *N.J.* at 293 n.10, 416 *A.*2d

372. It is remarkable that the majority opines that such representation can be authorized only by statute and not by a voluntary designation, such as by a power of attorney or by specific provision in an agreement.

Service of process upon corporations, foreign and domestic, in New Jersey is a function of court rule, not of statutes. Under the New Jersey Constitution of 1947 the Supreme Court has exclusive rule-making power over practice, procedure and administration of the courts. *Winberry v. Salisbury*, 5 *N.J.* 240, 74 *A.*2d 406, *cert.* denied, 340 *U.S.* 877, 71 *S.Ct.* 123, 95 *L.Ed.* 638 (1950). Thus, New Jersey does not have a long-arm statute. Long-arm service is available pursuant to *R.* 4:4-4(c)(1) (eff. Sept. 8, 1969) (source rule *R.R.* 4:4-4(d) (eff. Sept. 3, 1958)).

At the time the New Jersey Court Rules were first adopted, in 1948, the existing statutes governing service on corporations read:

> 2:26-43. Domestic corporations in personal actions; personal or substituted service of summons.
>
> Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy thereof to an officer, director, trustee or a managing or general agent of the corporation personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, *or by* delivering a copy thereof *to any person authorized by appointment* or by law *to receive service of process on behalf of the corporation*, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

2:26-44. Foreign corporations.

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised Statutes for service of summons upon a domestic corporation. [*L.*1948, *c.* 356 (emphasis supplied)].

The proposed draft Court Rules included a rule for service upon corporations, foreign and domestic, which closely followed the language of the now repealed statutes, *R.S.* 2:26-43 and 44 (1937).

The specific language of the rule was: d. [Service of process may be made u]pon a domestic or foreign corporation or partnership or other unincorporated association which is subject to suit under a recognized name, by serving in the manner prescribed in Paragraph a, an officer, a managing or general agent or, in the case of the corporation, a director or trustee or, in the case of a partnership, any partner; or upon the corporation, by serving personally *any person authorized by appointment* or by law to receive service of process, or any ticket or freight agent employed in any of the corporation's offices in the county in which the venue is laid; or as may be provided by law.[1] [*R.* 3:4-4(d) (Tentative Draft 1948) (emphasis supplied)].

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[1] The comment on Rule 3:4-4(d) provided:

This rule is broader than, and supplants, *R.S.* 2:26-43 (applicable at law) and 2:29-19 (applicable to suits in chancery) which are quite dissimilar in their terms. It does not supplant *R.S.* 2:26-44 applicable to foreign corporations; *R.S.* 2:26-44 and 45 dealing with service on domestic corporations by publication; *R.S.* 2:26-47 to 51 (cf. *R.S.* 14:6-2) dealing with service on secretary of state with respect to domestic and foreign corporations; *R.S.* 2:26-53 to 58.1 dealing with service as to foreign insurance companies, banks and others; *R.S.* 49:1-17 relative to the blue sky law; *R.S.* 14:13-14 relative to a defunct domestic corporation. The rule follows, somewhat,

It was modeled upon Fed.R.Civ.P. 4(d)(3). In 1948, Federal Rule 4(d)(3) authorized service within the territorial limits of the state within which the district court is held

> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to *any other agent authorized by appointment* or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. [Emphasis supplied].

The federal rule has been interpreted to include designations made by a party in an agreement. Thus, for example in *Emerson Radio & Phonograph Corp. v. Callander Distrib. Corp.*, 116 *F.Supp.* 926 (S.D.N.Y. 1953), service upon Prentice-Hall, Inc. as one designated in a franchise agreement "to accept in the name and on behalf of [the] distributor service of process" was held valid process under the federal rule. That court referred to the consistent practice in New York of recognizing the appointment of agents for service of process, citing *Gilbert v. Burnstine*, 255 *N.Y.* 348, 174 *N.E.* 706 (N.Y.Ct.App.1931). *Id.* at 927-28.

The majority's reliance upon the sponsor's statement to limit the effect of *N.J.S.A.* 2A:14-22 to foreign corporations which become licensed to do business in New Jersey is misplaced. It was quite natural for the spon-

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Federal Civil Rule 4(d)(3) except that it omits the last twenty-five words thereof.

The rule as adopted substantially conformed to the language of the Tentative Draft, except that the provisions for unincorporated associations and partnerships became separate rules. *See R.* 3:4-4(d), (e), (f) (eff. Sept. 15, 1948).

sor to describe the most serious problem the legislation addressed. Originally no foreign corporations, whether licensed, represented, or subject to process in New Jersey, could obtain the benefit of the running of the statute of limitations. *See Cramer v. Borden's Farm Products Co., Inc.*, 58 *F.*2d 1028 (S.D.N.Y.1932) (under New Jersey law, New York corporation licensed to do business in New Jersey is not resident of New Jersey and therefore is within scope of tolling statute). It was not until 1949 that any foreign corporations became exempt from its effects. The language of the statute is clear in extending the benefits of the running of the statute of limitations to corporations that are *represented* in the State, not corporations that are *licensed* to do business. That the sponsor highlighted its major purpose does not detract from the plain meaning of the statute, which we should follow. *See Service Armament Co. v. Hyland*, 70 *N.J.* 550, 562, 362 *A.*2d 13 (1976) (extrinsic aids to construction of statute do not alter its plain meaning).[2]

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[2] In *Cohn v. G.D. Searle & Co.*, 447 *F.Supp.* 903, 912 (D.N.J. 1978), rev'd, 628 *F.*2d 801 (3d Cir. 1980), vacated, 455 *U.S.* 404, 102 *S.Ct.* 1137, 71 *L.Ed.*2d 250 (1982), former District Judge Meanor found "[n]othing in the legislative history or court construction of *N.J.S.A.* 2A:14-22 [that] supports plaintiffs' assertion that a purpose of the statute is to penalize foreign unlicensed corporation to encourage licensure." He extended its benefits even to corporations amenable to process, a step further than we go, and one rejected by *Velmohos*. In two footnotes he cautioned against excess reliance upon the sponsor's statement.

> Mackey's introductory statement to the 1949 amendment to the New Jersey tolling statute indicated that New York had amended its tolling statute in a similar fashion in response to recent court decisions. Research has disclosed no significant cases prior to 1943 regarding persons through whom a foreign corporation might be served. However, section 1 of the 1943 amendment to C.P.A. § 19, n. 5, *supra*, was adopted specifically to alter the rule of *Maguire v. Yellow Taxicab Corp.*, 253 A.D. 249, 1 N.Y.S.2d 749, *rehearing denied*, 253 A.D. 890, 2 N.Y.S.2d 1021, *aff'd mem.* 278 N.Y. 576, 16 N.E.2d 110 (1938), which held that amenability to process through the Director of Motor

These precedents form the basis for the interpretation given the tolling statute by the *Velmohos* majority. Simply put in the circumstances of this case, the manufacturer of the motorcycles could have *appointed* its local dealer or distributor as a person authorized to receive service of process on behalf of the corporation.

The argument that such an appointment would give no public notice of the representation is especially hollow in the circumstances of this case where the motorcycle was purchased directly by the injured claimant Coons' cousin from American Honda Motor Co., Inc., a distributor for Honda Motor Company, Ltd. of Japan (Honda of Japan). It would require little effort or expense to add a line to the manufacturer's warranty advising the consumer of the appointment of the distributor to accept process with respect to product claims. In that way the foreign manufacturer would gain the benefit of the running of the statute of limitations without the burden of registering to do business in New Jersey. "The normal pattern that the manufacturer-dealer relationship follows relegates the position of the dealer to the status of a way station along the car's route from maker to consumer." *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 374, 161 *A.*2d 69 (1960). Where else would he go but to the dealer in the first place? In fact,

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Vehicles did not exempt a nonresident defendant from the tolling statute. These facts suggest that the New Jersey Legislature may well have intended that representation by a statutory agent within the state would be sufficient to satisfy the tolling statute's foreign corporation exemption. [447 *F.Supp.* 908 n. 9].

While the sponsor's statement regarding the 1949 amendment indicated that the legislature intended to give the benefit of the statute of limitations to foreign licensed corporations, the language of the amendment is not so narrowly phrased as to deny unlicensed corporations a statute of limitations defense. [447 *F.Supp.* 912 n.18].

Coons inquired whether the dealer would be authorized to accept service in this case.

The manufacturer need only designate a person whom it trusts to receive process for it. In this fashion the foreign manufacturing corporation may simply and expeditiously gain the advantage of having the statute of limitations run from the date the cause of action arises, for claims of plaintiffs who can reasonably be expected to have knowledge of that designation.

II.

We also disagree with the majority insofar as it rules that the Secretary of State even now lacks power to receive and file a foreign corporation's designation of an agent to receive process for the purpose of compliance with *N.J.S.A.* 2A:14-22.

The Attorney General has advised the Secretary of State that he has the power to accept such a designation and relies upon *N.J.S.A.* 14A:1-6(4), which provides that:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office. . . .

The Attorney General's position is that since *N.J.S.A.* 2A:14-22 presumes the designation by a foreign corporation of a representative for service of process (as we have seen, such designations may be accomplished by letters or powers of attorney), that statute constitutes authority for the Secretary of State to record such designations as documents that are "permitted by law" to be filed. Unquestionably, the designation of an agent for service of process by a foreign corporation "relate[s] to . . . [and] affect[s] [the] corporation[]." *N.J.S.A.* 14A:1-6(4). It is certainly within the spirit of the type of documents the Secretary of State receives from for-

eign corporations and the Attorney General opines that the Secretary of State should accept the documents. We perceive no reasons to reject his opinion. The filing of such a document would require a fee of $15, pursuant to *N.J.S.A.* 14A:15-3(15). The filing of that document would constitute a public record available to any person for inspection and duplication in accordance with *N.J.S.A.* 14A:1-9, which states that:

> (1) Upon request of any person, the Secretary of State shall furnish certified copies of documents filed in his office in accordance with the provisions of this act.
>
> (2) Upon request of any person, the Secretary of State shall certify to the existence or non-existence of any facts on record in his office relating to domestic or foreign corporations.

Therefore, in the Attorney General's view, the applicable statutory framework provides a clear mechanism by which the record of a designated agent by a foreign corporation can and will be reflected by the New Jersey Secretary of State. We agree that that position can be maintained under New Jersey law.

Although the customary meanings of the two phrases are similar, the majority makes a distinction between "record[ing]" and "filing," *ante* at 925.[3] We believe that it is too narrow an interpretation of the powers of the Secretary of State, a constitutional officer. Indeed, the Attorney General's interpretation of the duty of the Sec-

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[3] File . . . vb . . . to deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office.

Record . . . vb . . . to make or have made an authentic official copy of (as a deed, mortgage, lease) and deposit or have deposited esp. as in an office designated by law. [Webster's International Dictionary 849, 1898 (3 ed. 1976)].

retary of State to receive and file this one-page document under *N.J.S.A.* 14:1-6(4) is consonant with the concept that statutes should be interpreted so as to be in harmony with constitutional requirements. *See Right to Choose v. Byrne*, 91 *N.J.* 287, 450 *A.*2d 925 (1982) (excision of offending provision prohibiting reimbursement for therapeutic abortions justified to maintain balance of Medicaid program); *Jordan v. Horsemen's Benev. & Protect. Ass'n*, 90 *N.J.* 422, 448 *A.*2d 462 (1982) (allocation and reporting requirements imposed to uphold legislative program to distribute portions of purses to horsemen); *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 411 *A.*2d 168 (1980) (judicial surgery performed upon legislation to implant threshold reporting requirements to uphold campaign reporting act).

All we need do to sustain the legislation is to emphasize that it is beyond legislative power to require of foreign corporations the full panoply of registration to be covered by our statute of limitations and that provisions of the legislation inconsistent therewith would yield to the general legislative purpose. *See New Jersey State Parole Bd. v. Byrne*, 93 *N.J.* 192, 460 *A.*2d 103 (1983); *United States Chamber of Commerce v. State*, 89 *N.J.* 131, 445 *A.*2d 353 (1982); *State v. Zito*, 54 *N.J.* 206, 254 *A.*2d 769 (1969).[4] We agree that it would be unfair to apply

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[4] In this way the designation of an agent for service of process would not be converted into a submission to the general jurisdiction of our courts. It would only facilitate service over otherwise amenable defendants. In this case Honda of Japan has preserved its jurisdictional defense under *World-Wide Volkswagen Corp. v. Woodson*, 444 *U.S.* 286, 100 *S.Ct.* 559, 62 *L.Ed.*2d 490 (1980). There is a conundrum in the argument that the foreign corporation must surrender its jurisdictional defense by registering to gain the benefit of the statute because, by definition, if it is beyond the jurisdiction of the State under *World-Wide Volkswagen*, it cannot be sued at all and the statute of limitations issue is irrelevant. The life of the law is not always logic.

this ruling to the parties in view of the position previously taken by the Secretary of State in *Searle*. *Ante* at 924 n. 5. However, we see no reason why the Secretary cannot accept such designations in the future. Such a reading would preserve the constitutionality of the statute.

III.

Because of our conclusion, we find the legislative scheme does not violate the Commerce Clause.

> When, as here, Congress has not preempted the field, states may enact legislation that touches upon interstate commerce. *See generally K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Comm'n*, 75 *N.J.* 272, 294-300 [381 *A.*2d 774] (1977). When a state acts to prohibit out-of-state competition, a virtually *per se* rule of invalidity has been applied. *Philadelphia v. New Jersey*, 437 *U.S.* 617, 624, 98 *S.Ct.* 2531, 2535, 57 *L.Ed.*2d 475, 481 (1978). *See also Baldwin v. G.A.F. Seelig, Inc.*, 294 *U.S.* 511, 527, 55 *S.Ct.* 497, 502, 79 *L.Ed.* 1032, 1040-41 (1935). But when the legislation promotes the health, welfare and safety of its inhabitants, the analysis then requires that a determination be made as to whether the effect of the statute on interstate commerce is only incidental. If the burden is clearly excessive in relation to the local interest, the statute will be declared invalid. The extent to which a burden on interstate commerce will be tolerated depends on the nature of the local interest and on whether that local interest could be promoted in an alternative fashion without such a burden. *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142, 90 *S.Ct.* 844, 847, 25 *L.Ed.*2d 174, 178 (1970). [*United States Chamber of Commerce v. State*, 89 *N.J.* at 160-61, 445 *A.*2d 353].

It is clear here that we are not dealing with a case of direct discrimination against foreign commerce. Had

that been so, the United States Supreme Court would have invalidated the legislation on the first go-round. Even Justice Stevens in dissent in *Searle* concluded that "there is a rational basis for treating unregistered foreign corporations differently from registered corporations because they are somewhat more difficult to locate and to serve with process." 455 *U.S.* at 420, 102 *S.Ct.* at 1147, 71 *L.Ed.*2d at 263. The legislation has a sound and beneficial state purpose. That purpose is clear, not to favor local businesses, but to guard the citizens against loss of their rights due to the conduct of absent enterprises.

Analysis of commerce clause challenges to state regulations that are not protectionist have generally yielded broadest authority to the states.

> In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." [*Huron Portland Cement Co. v. Detroit*, 362 *U.S.* 440, 443-44, 80 *S.Ct.* 813, 815-16, 4 *L.Ed.*2d 852, 856 (1960) (quoting *Sherlock v. Alling*, 93 *U.S.* 99, 103, 23 *L.Ed.* 819, 820 (1876))].

See also Raymond Motor Transportation, Inc. v. Rice, 434 *U.S.* 429, 98 *S.Ct.* 787, 54 *L.Ed.*2d 664 (1978); *Southern Pacific Co. v. Arizona*, 325 *U.S.* 761, 65 *S.Ct.* 1515, 89 *L.Ed.* 1915 (1945). The Commerce Clause is, after all, a grant of authority to Congress, not to the courts. *Cf. Northwest Airlines, Inc. v. Minnesota*, 322 *U.S.* 292, 302, 64 *S.Ct.* 950, 955, 88 *L.Ed.* 1283, 1290 (1944) (Black, J., concurring) ("The Constitution gives [Congress] the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution").

We should decide a constitutional burden on the basis of the case before us. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 495 & n.7, 102 *S.Ct.* 1186, 1191 & n.7, 71 *L.Ed.2d* 362, 369 & n.7 (1982); *In re Martin*, 90 *N.J.* 295, 309-10, 447 *A.*2d 1290 (1982); *Shelton College v. State Bd. of Educ.*, 48 *N.J.* 501, 521-23, 226 *A.*2d 612 (1967). To suggest it is a disproportionate burden for a worldwide enterprise to adapt to the statute of limitations law of the State of New Jersey and to designate an agent for service of process is simply not persuasive. According to the Standard Directory of Advertisers (1982), Honda spent $21,500,000 on advertising in this country. Moody's International reports that Honda of Japan's sales in 1982 were $7,945,400,000.[5] The message they send to the New Jersey consumer is clear and forceful. The Legislature has asked manufacturers to send one little brief message about where they can be found in case anything goes wrong with the motorcycle.

The irony here is that the purpose of the Legislature, in enacting the 1949 amendments to the statute of limitations, was to put foreign corporations on an even footing with individuals. Thus a foreign corporation, which was then considered domiciled elsewhere, could gain the advantage of the New Jersey statute of limitations if it had agents for process in New Jersey. In that respect, it would be no different from an individual, partnership or unincorporated association doing business. The anomaly of the Court's decision is that a corporation now has

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[5] The Appellate Division granted leave to Brinco Mining Limited to participate in the proceedings as an *amicus curiae*. It was a bit like inviting the fox into the hen house. Papers on file with us refer to pending litigation in the United States Court for the District of New Jersey where its amenability to process was at issue. Like Honda, it has a direct interest in the case's outcome and the wherewithal to comply with our tolling statute. Brinco Mining is a worldwide resource development company with 1980 income of $18,000,000. In 1980 it acquired Cassiar Resources Ltd., a Canadian processor of asbestos.

an advantage over an individual. The long-standing judicial construction of this statute is that even though an absent individual defendant is subject to substituted service in New Jersey, the statute still tolls. *Lemke v. Bailey*, 41 *N.J.* 295, 196 *A.*2d 523 (1963) (service in a motor vehicle case upon the Director of Motor Vehicles); *cf. Guas v. Guas*, 146 *N.J.Super.* 541, 370 *A.*2d 91 (Law Div. 1977) (jurisdiction based on residence at time of accident; move to another state tolled statute). The equation of amenability with presence has never been followed by our courts.

The legislative judgment is one with which we may or may not agree. The point is that our courts have agreed with it for a long time and the Legislature has never changed it. *Lemke*, 41 *N.J.* 295, 196 *A.*2d 523; *Lackovic v. New England Paper Tube Co., Inc.*, 127 *N.J.Super.* 394, 317 *A.*2d 426 (Law Div. 1974) (corporate defendant); *Whalen v. Young*, 28 *N.J.Super.* 543, 101 *A.*2d 64 (Law Div. 1953), rev'd on other grounds, 15 *N.J.* 321, 104 *A.*2d 678 (1954) (corporate defendant); *Gotheiner v. Lenihan*, 29 *N.J.Misc.* 119, 25 *A.*2d 430 (Sup. Ct. 1942); *Blackmon v. Govern*, 138 *F.Supp.* 884 (*D.N.J.* 1956). The only contrary holding, *Ferraro v. Ferro Trucking Co.*, 72 *N.J.Super.* 519, 179 *A.*2d 74 (Law Div. 1962), has been discredited. *See Lackovic*, 127 *N.J.Super.* at 397-98, 317 *A.*2d 426; *Hopkins v. Kelsey-Hayes, Inc.*, 463 *F.Supp.* 539, 541 (D.N.J. 1978), aff'd, 628 *F.*2d 801 (3d Cir. 1980), vacated, 455 *U.S.* 985, 102 *S.Ct.* 1605, 71 *L.Ed.*2d 844 (1982).

The essence of what the majority is doing is to repeal the tolling provision with respect to nonresident corporations since, as Judge Brotman pointed out in *Hopkins*, "the vast majority who commit torts within the state would be amenable to long-arm service. Without more authority, we cannot construe a state statute in a manner rendering it ineffective." 463 *F.Supp.* at 542. We would not do so either.

We understand the logic of the argument that was advanced by Justice Sullivan for the dissenting members

of the Court in *Velmohos*, 83 *N.J.* at 297-99, 416 *A.*2d 372, that we should take into account the jurisdictional change of long-arm service of process that has extended "to the uttermost limits permitted by the United States Constitution," *Avdel Corp. v. Mecure*, 58 *N.J.* 264, 268, 277 *A.*2d 207 (1971), and interpret the tolling statute in accordance with that change. We respect that argument but it was rejected in *Velmohos*. We either stand behind that judgment or we do not.

Taken in this framework, we cannot entertain that belief of unconstitutionality beyond a reasonable doubt necessary to invalidate this legislative program. *Harvey v. Essex County Bd. of Freeholders*, 30 *N.J.* 381, 388, 153 *A.*2d 10 (1959); *New Jersey Sports & Exposition Auth. v. McCrane*, 119 *N.J.Super.* 457, 292 *A.*2d 580 (Law Div. 1971), modified and aff'd, 61 *N.J.* 1, 292 *A.*2d 545, appeal dismissed *sub nom. East Rutherford v. New Jersey Sports & Exposition Auth.*, 409 *U.S.* 943, 93 *S.Ct.* 270, 34 *L.Ed.*2d 215 (1972). For when we base our decision upon the Constitution we leave no room for legislative cure.

IV.

Honda of Japan manufactured the motorcycle purchased by the plaintiff through Honda's local distributor. Honda of Japan could easily and at minimal cost have designated its local dealer to accept service of process. If it had done so, it would have been "represented" in this State and the statute of limitations would not have been tolled under *N.J.S.A.* 2A:14-22. Honda of Japan chose to do otherwise and therefore the statute of limitations has been tolled.

Moreover, we would permit every foreign corporation to file a designation or appointment for service of process within this State with the Secretary of State. We conclude, therefore, that *N.J.S.A.* 2A:14-22 does not violate the Commerce Clause.

We would affirm the judgment.

Chief Justice WILENTZ joins in this opinion.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

WALTER P. COONS,
Plaintiff-Respondent,

v.

HONDA MOTOR COMPANY, LTD. OF JAPAN, a corporation,
Defendant-Appellant.

Argued December 9, 1980—Decided December 29, 1980

Before Judges FRITZ, POLOW and JOELSON.

John I. Lisowski argued the cause for appellant (*Morgan, Melhuish, Monaghan & Spielvogel,* attorneys).

Robert H. Jaffe argued the cause for respondent (*Robert H. Jaffe* and *Howard G. Schlesinger* on the brief).

The opinion of the court was delivered by

POLOW, J. A. D.

On October 30, 1974, plaintiff suffered serious injuries when thrown from his 1972 Honda CB350 motorcycle. In his complaint, filed October 30, 1978, he demanded damages from the designer-manufacturer, Honda Motor Co., Ltd. of Japan (Honda Ltd.) and its distributor, American Honda Motor Co., Inc. (American Honda) alleging that he suffered severe burns when the defectively

designed gas cap opened during the accident and a fire ensued. American Honda, a wholly owned subsidiary of Honda Ltd., is authorized to do business in New Jersey and was promptly served. A year later, the court authorized service of process on Honda Ltd. through service on a Washington D.C. law firm acting as its agent, it was effected accordingly and Honda Ltd. became a defendant.

Summary judgment was granted in favor of American Honda based on its contention that plaintiff's suit was barred by the statute of limitations. In a separate opinion filed this day, we have affirmed that judgment against plaintiff. Here we deal with the appeal of defendant Honda Ltd. which contends that the court lacked in personam jurisdiction over it and that, in any event, it, too, should be afforded the protection of the statute of limitations, *N.J.S.A.* 2A:14-2.

In December 1977, American Honda notified the National Highway Traffic Safety Administration of its intention to recall certain motorcycle models because a defect had been discovered in the fuel filler cap release mechanism. Notices of the defect were forwarded to owners of the recalled motorcycles, including the 1972 Honda CB350, in December 1977, but plaintiff claims he was unaware of the recall notice until July 1978 when so advised by his neighbor. Hence, he contacted counsel and suit was instituted on October 30, 1978. Appellant does not question the propriety of plaintiff's certification that after diligent inquiry and effort, personal service could not be made on any servant of Honda, Ltd., within this state, and that since the corporation is a foreign corporation with no place of business in this state, as far as service of process is concerned, it may be made by registered or certified mail return receipt requested to a registered agent. *R.* 4:4-4(c)(1). However, appellant attacks the ruling in favor of in personam jurisdiction, asserting lack of minimum contacts. Additionally, assuming *ar-*

guendo that there is jurisdiction, it seeks protection of the statute of limitations.

Historically, jurisdiction was based upon a court's de facto authority over the person of the individual. *Pennoyer v. Neff*, 95 *U.S.* 714, 24 *L.Ed.* 565 (1878). Accordingly, the physical presence of a defendant within the jurisdiction was critical to a binding judgment. However, in *Int'l Shoe Co. v. Washington*, 326 *U.S.* 310, 66 *S.Ct.* 154, 90 *L.Ed.* 95 (1945), the Supreme Court extended the concept of due process to include in personam jurisdiction over a defendant not present within the territory of the forum provided he has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play.'" *Id.* at 316, 66 *S.Ct.* at 158. *See Milliken v. Meyer*, 311 *U.S.* 457, 463, 61 *S.Ct.* 339, 342, 85 *L.Ed.* 278 (1940).

Nevertheless, the "minimum contacts" requirement, in order to satisfy due process, requires that the defendant have some contacts, ties, or relations with the forum state for in personam jurisdiction or that "a corporation exercis[e] the privilege of conducting activities within a state" thus enjoying the benefits and protection of its laws. *Int'l Shoe Co. v. Washington, supra*, 326 *U.S.* at 319, 66 *S.Ct.* at 160. Since 1945 there has been a discernible trend in the direction of expanding in personam jurisdiction to the extent that, in 1974, a New Jersey Federal District Judge wrote that

> when a manufacturer deliberately seeks to profit from marketing its products in a state, he is doing business within that state as to each transaction, whether he does so by an agent, indirectly by mail or even more indirectly through a third party, who may have an exclusive distributorship. In such case there is nothing unfair, unjust or violative of due process standards in imposing '*in personam*' jurisdiction over such a manufacturer in an action predicated upon that transaction.

> Indeed, under such circumstances it would be fundamentally unfair for those who purchased products in New Jersey, relying on the protection of New Jersey's laws and courts to assure that New Jersey's standards of fitness and warranties would be maintained, to be denied adjudication of their claims, and forced to travel throughout this nation, perhaps the world, seeking a forum in which the manufacturer of these goods was actually present. [*Gelineau v. New York Univ. Hosp.*, 375 *F.Supp.* 661, 667 (D.N.J. 1974)]

Two years after that decision, a Federal District court in Nebraska under circumstances similar to those here present, involving this very appellant corporation, denied its motion to dismiss for lack of in personam jurisdiction. *Hetrick v. American Honda Motor Co., Inc.*, 429 *F.Supp.* 116 (D.Neb. 1976). There, addressing the due process issue, the court said: "Where a foreign defendant has reason to know that its products, traveling through interstate commerce will reach an ultimate consumer in any state of the United States, due process is satisfied." *Id.* at 118. Furthermore, it was reasoned that "it would be fundamentally unfair to allow a foreign manufacturer to insulate himself from the jurisdiction of the courts by use of an exclusive distributor." *Id.* at 118-119.

Our state courts have been active in interpreting and applying the minimum contacts test requiring that "the quality and nature of the contacts [be] such that maintenance of the suit does not offend 'traditional notions of fair play and justice.'" *Feldman v. Bates Manufacturing Co.*, 143 *N.J.Super.* 84, 89 (App. Div. 1976). *See Trustees of Structural and Ornamental Iron Workers Fund v. Huber*, 136 *N.J.Super.* 501, 505 (App. Div. 1975) certif. den. 70 *N.J.* 143 (1976). The necessary minimum contact may be found in the relationship between a foreign manufacturer and its New Jersey distributor.

Certisimo v. Heidelberg, 122 *N.J.Super.* 1 (Law Div. 1972), aff'd sub nom. *Van Eeuwen v. Heidelberg Easter, Inc.*, 24 *N.J.Super.* 251 (App. Div. 1973). Maintenance of such a suit does not offend the concepts of fair play and substantial justice. This is particularly true where as seems apparent here, the manufacturer-distributor relationship is an active one and explicitly designed to provide and ensure the sale of the foreign corporation's products. Obviously, the foreign corporation enjoyed substantial revenue from sales within this state.

The most recent application of the minimum contacts standard by the United States Supreme Court, while rejecting long-arm jurisdiction, provided dictum entirely applicable here. In *World-Wide Volkswagen Corp. v. Woodson*, 444 *U.S.* 286, 100 *S.Ct.* 559, 62 *L.Ed.*2d 490 (1980), Mr. Justice White stated:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. [*Id.* at 297, 100 *S.Ct.* at 567]

In the situation *sub judice*, an affidavit of an assistant vice-president of American Honda reveals that appellant manufactures products in Japan and that sales are consummated in that country in accordance with American Honda's orders. All deliveries are made by appellant to American Honda f. o. b. Japan. Nevertheless, American Honda is a wholly owned subsidiary of appellant Honda, Ltd. We are convinced that a foreign manufacturer may not successfully insulate itself completely from suit in this country by such an arrangement where its product is negligently manufactured abroad and delivered for sale here and then avoid re-

sponsibility by use of its exclusive agent or distributor. *See Gelineau v. New York Univ. Hosp., supra,* 375 *F. Supp.* at 667; *Van Eeuwen v. Heidelberg, supra.*

We conclude that appellant's reliance on *World-Wide Volkswagen* is unavailing. Not only is it distinguishable factually in that there the corporation's products were not sold in the forum state but, in addition thereto, the dictum therein is logical and persuasive. Hence, we affirm the ruling of the trial judge denying appellant's motion to dismiss the complaint for lack of in personam jurisdiction.

Appellant's next argument has some surface appeal. Honda Ltd. reasons that if in personam jurisdiction may be acquired simply by serving its legal agents in Washington D.C., then it is amenable to process and there is no reason to deny operation of the bar of the statute of limitations, *N.J.S.A.* 2A:14-2. Furthermore it suggests that failure to apply that bar in this case and the statutory justification for tolling the statute under these circumstances, *N.J.S.A.* 2A:14-22, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. Presumably, to support that argument, appellant could show that the very same legal agent ultimately served with process in 1979 was equally available in 1976, before the two year period of limitations had expired.

Any lingering concern about the propriety and constitutionality of the statutory provision which tolls the statute of limitations with respect to claims against a foreign corporation not represented in this state by anyone upon whom service of process can be made, *N.J.S.A.* 2A:14-22, has been dissipated by recent decisions of the New Jersey Supreme Court and the Third Circuit Court of Appeals, *Velmohos v. Maren Engineering Corp.*, 83 *N.J.* 282 (1980) and *Hopkins v. Kelsey-Hayes, Inc.*, 628 *F.*2d 801 (3d Cir. 1980).

Velmohos involved a suit against two corporations of the State of Illinois, the designer and manufacturer of an allegedly defective shredder-baler. Since neither defendant maintained a registered office in this state or had agents for service of process located in New Jersey, the provisions of *N.J.S.A.* 2A:14-22 were held to have tolled the statute of limitations although long-arm service could have been made outside of this state within the two year period.

Justice Pashman reasoned that the statutory language "not represented in the state by any person or officer upon whom summons or other original process may be served" is not interchangeable with "not amenable to service." *Velmohos v. Maren Engineering Corp., supra,* 83 *N.J.* at 288. Therefore, "unrepresented, foreign corporations subject to long-arm service are not exempt from *N.J.S.A.* 2A:14-22. *Ibid.*

The *Velmohos* court noted that *N.J.S.A.* 2A:14-22 (originally *R.S.* 2:24-7) was amended in 1949 for the express purpose of exempting "from the statute domestic corporations and those foreign corporations maintaining representatives in New Jersey." *Id.* at 289. Prior to 1949, the tolling provision did not deal with the foreign corporate defendant at all. *Ibid.* As the statement accompanying the 1949 Assembly Bill indicated: " 'Foreign corporations *licensed to do business in New Jersey* are not deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation.' " *Id.* at 290 (emphasis added). Obviously, amenability to service is not the appropriate test. Since the legislature "acted to remove only represented corporations from the tolling provisions of *N.J.S.A.* 2A:14-22," absent express language "incorporating amenability to long-arm service as an exemption from the tolling statute, that class of foreign corporations remains subject to its effect." *Id.* at 292-293 (footnote omitted). "[W]hatever hardship on foreign corporations might be

caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." *Id.* at 293 n. 10; *Lemke v. Bailey*, 41 *N.J.* 295 (1963); *Govan v. Trade Bank and Trust Co.*, 109 *N.J.Super.* 271 (App. Div. 1970).

Appellant also projects the argument that "there are Honda dealers readily found in the yellow pages of any telephone directory," thus suggesting that Honda's high visibility warrants the conclusion that service could properly be effected in this state. The argument lacks force. *R.* 4:4-4(c)(1) deals only with "amenability" to service of process. *N.J.S.A.* 2A:14-22 tolls the statute of limitations with regard to foreign unregistered corporations "not represented in this state by a person or officer" for service of process. Without regard for the unlikely proposition that Honda dealers are agents of Honda Ltd., the tolling provision of the statute refers to individuals who "represent" rather than those who perform details or who may be "minor functionaries" of the foreign corporation. *Hopkins v. Kelsey-Hayes, Inc., supra*, 628 *F.*2d at 808. "[T]he statutory tolling provision contemplates a much more significant corporate figure or presence—one capable of 'representing' the corporation—than does the service rule." *Ibid.*

Velmohos and *Hopkins* leave no room for doubt that the statute of limitations does not bar plaintiff's action against Honda Ltd. Rather, the tolling provision, *N.J.S.A.* 2A:14-22, preserves plaintiff's claim under the circumstances, there being no representative of appellant in this state. Hence, we affirm the determination of the trial judge in that regard.

Defendant's constitutional argument that *N.J.S.A.* 2A:14-22 violates the equal protection clause has been put to rest by the Supreme Court in *Lemke v. Bailey, supra*, 41 *N.J.* at 303 and, much more recently, in *Velmohos*, as demonstrated by the following comment:

> The flaw in defendants' argument is that it recognizes as rational only a distinction based on the impossibility of obtaining jurisdiction over a foreign corporation. It refuses to acknowledge that among amenable foreign corporations there are degrees of difficulty in effecting service. A recognition of these degrees of difficulty supplies a present rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service. [83 *N.J.* at 295].

The *Hopkins* court also addressed the equal protection argument in the following paragraph:

> Since long-arm service is more difficult to achieve than service within the state, it is not irrational for New Jersey to distinguish between two classes of foreign corporations. Those foreign corporations which are represented in New Jersey, and are thus more readily available to plaintiffs, are afforded limitations protections. On the other hand, the limitations statutes are tolled against foreign corporations which are not represented in New Jersey and thus are not as available to New Jersey plaintiffs. This distinction between represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it

recognizes is irrational. [628 *F.*2d at 810-811 (footnote omitted)].

Accordingly, the order of the trial court denying the motion of Honda Motor Co., Ltd. of Japan for summary judgment, is affirmed and the matter is remanded for trial.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3229-79

WALTER COONS,
Plaintiff-Appellant,

v.

AMERICAN HONDA MOTOR CO., INC., *et al.*,
Defendant-Respondent.

Argued December 9, 1980—Decided December 29, 1980

Before Judges Fritz, Polow and Joelson.

On appeal from the Superior Court of New Jersey
Law Division, Middlesex County

Robert H. Jaffe argued the cause for appellant (Robert H. Jaffe and Howard G. Schlesinger on the brief).

John I. Lisowski argued the cause for respondent (Morgan, Melhuish, Monaghan & Spielvogel, John I. Lisowski, of counsel and on the brief).

PER CURIAM

Plaintiff suffered severe burns when, while driving his Honda CB350 motorcycle, an accident occurred forcing his body over the gas tank toward the handlebars. As a result, the gas cap mechanism was triggered, the cap

opened permitting gasoline to flow from the tank, it ignited and the burns ensued.

The accident took place on October 30, 1974. On October 30, 1978, plaintiff filed a complaint seeking damages from the distributor American Honda Motor Co., Inc. (American Honda), a corporation authorized to do business in New Jersey, and the designer-manufacturer Honda Motor Co., Ltd. of Japan which has no corporate presence in this state. Summary judgment was granted in favor of American Honda upon a determination that plaintiff's action was barred by the statute of limitations since the action had not been commenced within two years after the cause of action accrued, *N.J.S.A.* 2A:14-2, and we deal, in this opinion, with plaintiff's appeal therefrom.

More than a year after the complaint was filed, plaintiff effected long-arm service on Honda, Ltd., a Japanese corporation, by serving its legal agent in Washington, D.C. The trial judge ruled that *in personam* jurisdiction over the foreign manufacturer was thus obtained and that as against Honda, Ltd., the action was not barred by the statute of limitations. On separate applications, we granted plaintiff leave to appeal from the summary judgment awarded in favor of American Honda and we granted Honda, Ltd., leave to appeal from denial of its summary judgment motion. We are simultaneously herewith filing a separate opinion affirming the latter determination against Honda, Ltd., in the companion appeal. Hence, plaintiff's claim against the Japanese corporation will proceed to trial irrespective of our conclusion in this appeal that the claim against American Honda, the distributor in New Jersey, is barred by the statute of limitations as determined by the trial judge.

At the *Lopez* hearing, (*Lopez v. Swyer*, 62 *N.J.* 267 (1973)), plaintiff acknowledged that he knew that his body had been forced "over the tank up toward the handlebars," that the fuel cap had opened and that gaso-

line had poured from it. Having operated the vehicle for six or seven months, he also knew that the hinged gas cap was designed to open upon depressing a button. The defect, as described by defendants in their report to the National Highway Traffic Administration in December 1977, was such that during a collision the "rider may impact the hinged fuel filler cap in such a manner as to actuate the release lever resulting in opening of the cap" and "[i]f the cap opens, gasoline will escape and cause a fire hazard."

Following the *Lopez* hearing, the trial judge ruled that plaintiff had knowledge immediately upon the happening of the accident of "the facts upon which a basis for an actionable claim can be grounded." Hence, the two year limitation for institution of this action began to run on October 30, 1974, the date of the accident, more than four years before suit was instituted.

The Supreme Court of New Jersey has articulated the rationale of the discovery rule in the following manner:

> We find the trial judge to have been in error in concluding that regardless of when a claimant knows or reasonably should know the *facts* of the relationship of his injury to a particular source or cause, the applicable limitations period does not begin running until he learns from a lawyer that those facts equate with a legal cause of action against the producer or originator of the injurious source or cause. It was not our intent [in *Lopez v. Swyer, supra*] to hold that a claimant's time to sue, for limitations purposes, does not begin to run until he knows or is advised by a lawyer that facts of which he does, or should, reasonably have knowledge, give rise to a legal cause of action against a particular defendant. The statute of limitations necessarily imputes conclusively to a claimant knowledge that the law affords or may afford a cause of action on the basis of those facts of injury and causal relationship which

> in law do evoke a cause of action. In this regard it is of no consequence whether the cause of action arises in the field of products liability or any other aspect of tort law, or as to the degree of expertise which different lawyers possess in one such field or another. The discovery principle modifies the conventional limitations rule only to the extent of postponing the commencement of accrual of the cause of action until plaintiff learns, or reasonably should learn, the existence of that *state of facts* which may equate in law with a cause of action. There is no suggestion in any of the leading cases in this area that accrual of the cause of action is postponed until plaintiff learns or should learn the state of the law positing a right of recovery upon the facts already known to or reasonably knowable by the plaintiff. [*Burd v. N.J. Tel. Co.*, 76 *N.J.* 284, 291-292 (1978)].

Plaintiff had owned his motorcycle six or seven months before the accident and knew that the gas cap opened when the button was depressed. That knowledge and his awareness that his body had been "forced over the tank up toward the handlebars", that after the accident the gas cap was "slightly ajar" and that gasoline poured out of the tank justifies the conclusion that all relevant facts which may equate with a legal cause of action were known to him in October 1974 thus triggering the operation of the statute of limitations. In view of plaintiff's knowledge at the time of the incident itself, the date of defendant's notice of recall and report of the defect is irrevelant. *Burd v. N.J. Tel. Co., supra*; *Lopez v. Swyer, supra*; *Silverman v. Lathrop*, 168 *N.J. Super.* 333 (App. Div. 1979).

For the reasons stated, the summary judgment in favor of defendant American Honda Motor Co., Inc., is affirmed.

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-9016-78

Civil Action

WALTER P. COONS,

Plaintiff,

vs.

HONDA MOTOR CO., LTD. OF JAPAN, *et al.*,

Defendants.

ORDER STRIKING HONDA LTD's
FIFTH AND SIXTH AFFIRMATIVE DEFENSES

This matter having been opened to the Court by Robert H. Jaffe, P.A., attorneys for the plaintiff, Walter P. Coons, for an order striking the defendant's fifth and sixth affirmative defenses, Robert H. Jaffe, Esq., appearing and John I. Lisowski, Esq. appearing in opposition thereto and in support of motions to dismiss or, alternatively, for summary judgment; and for good cause shown;

It is on this 25th day of February, 1980;

ORDERED THAT there be striken from the answer of the defendant Honda Motor Co. Ltd. of Japan its fifth affirmative defense of lack of jurisdiction;

IT IS FURTHER ORDERED THAT there be striken from the answer of the defendant its sixth affirmative defense concerning the statute of limitation;

AND IT IS FURTHER ORDERED THAT the motions of defendant Honda Motor Co., Ltd. of Japan to dismiss the complaint or, alternatively, for summary judgment are denied.

/s/ Herman L. Breitkopf
HERMAN L. BREITKOPF, J.S.C.

APPENDIX F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-9016-78

Civil Action

WALTER P. COONS,

Plaintiff,

vs.

AMERICAN HONDA MOTOR CO., INC., *et al.*,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF THE DEFENDANT,
AMERICAN HONDA MOTOR CO., INC.

This matter having been brought before the Court on Motion of the attorneys for the defendant, American Honda Motor Co., Inc., John I. Lisowski, Esq., appearing and Robert H. Jaffe, Esq. appearing for plaintiff in opposition thereto for an Order granting Summary Judgment on behalf of the American Honda Motor Co., Inc., and the Court having taken testimony and having heard the argument of counsel, and for good cause shown;

It is on this 26th day of December, 1979;

ORDERED, that Summary Judgment based on the Statute of Limitations be and the same is hereby granted as to American Honda Motor Co., Inc., and it is further

ORDERED, that plaintiff's motion to strike the defense of the Statute of Limitations be and the same is hereby denied, and it is further

ORDERED, that a copy of the within Order be forwarded to all counsel with 7 days of the date hereof.

/s/ Herman L. Breitkopf
HERMAN L. BREITKOPF, J.S.C.

APPENDIX G

SUPREME COURT OF NEW JERSEY

September Term 1982

20,338

WALTER P. COONS,
Plaintiff-Respondent,

vs.

AMERICAN HONDA MOTOR CO., INC.,
Defendant-Appellant.

[Filed Sep. 17, 1982]

ACTION ON CERTIFICATION ORDER

Pursuant to Rule 2:12-1 it is ORDERED that the appeal from the judgment entered in this cause February 25, 1980, in the Superior Court, Law Division now pending in the Superior Court, Appellate Division A-2857-79, be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers necessary to be filed in this cause by the parties hereto in the prosecution of this appeal shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 14th day of September, 1982.

/s/ Stephen W. Townsend
Clerk

APPENDIX H

IN THE SUPREME COURT OF NEW JERSEY

Docket No. A-87

WALTER P. COONS,

Petitioner,

—vs—

AMERICAN HONDA MOTOR COMPANY, INC.,

Respondent.

TRANSCRIPT OF PROCEEDINGS

January 24, 1984

IN ATTENDANCE:

CHIEF JUSTICE ROBERT W. WILENTZ
JUSTICE ROBERT L. CLIFFORD
JUSTICE SIDNEY M. SCHREIBER
JUSTICE ALAN B. HANDLER
JUSTICE STEWART G. POLLOCK
JUSTICE DANIEL J. O'HERN
JUSTICE MARIE L. GARIBALDI

APPEARANCES:

ROBERT H. JAFFE, ESQ., for Petitioner Coons
JOHN I. LISOWSKI, ESQ., for Respondent Honda
KARL ASCH, ESQ., Amicus Curiae
HARRY S. HAUSHALTER, D. A. G., for Intervenor-Respondent Attorney General
I. MICHAEL GREENBERGER, ESQ., for Amicus Curiae Brinco Mining, Ltd.
RAYMOND M. TIERNEY, JR., ESQ., for Amicus Curiae G. D. Searle & Co.

[2]* CHIEF JUSTICE WILENTZ: The next matter is A87-82, Coons versus American Honda Motor Company, Inc.

Mr. Jaffe?

* * * *

[5] THE COURT: When he [Mr. Coons] discovered that he had a cause of action what was the status of the law then?

MR. JAFFE: The status of the law when he discovered was July, 1978. That's when he received the Notice [6] of Recall from Honda—

THE COURT: Right—

MR. JAFFE: —indicating that there was a product defect and he connected in his mind the product defect to the fact that he was riding a motorcycle on October 30, 1974 that seemed to explode in mid-air.

* * * *

[6] MR. JAFFE: I think we have to explore what would have happened if he'd [Mr. Coons] gone to an attorney in July, 1978, ...

* * * *

[7] THE COURT: Would not a lawyer of average competence do more than check the annotations, in as much as he's now focused on a particularly critical point of law as far as his client is concerned. He'd do more than that, would he not?

MR. JAFFE: I—let's say that he was a lawyer of better than average competence, your Honor. He would be not only searching all the New Jersey cases, ... [8] And he would have also at that point probably have advised Mr. Coons to do what in fact happened, file his suit as quickly as possible and within a few months after receiving the notice on August, on October 30, 1978, Mr. Coons filed suit.

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* Original pagination is indicated in brackets.

[14] CHIEF JUSTICE WILENTZ: Mr. Asch?

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[18] THE COURT: Wasn't the long arm, the long arm rule applicable to these corporations as well? Couldn't you have effected service?

[19] MR. ASCH: The long arm rule certainly was applicable. If—

CHIEF JUSTICE WILENTZ: So you could have—your clients could have, or the other lawyers representing clients in your situation as you found yourself in, could have effected service on these foreign corporations anyway.

MR. ASCH: We did in fact effect service once we were contacted in, in the case, your Honor.

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